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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
Respondent,

vs.

WERNER ERNST GREGG and
ROSWITHA L. GREGG,
Petitioners.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

WHAT ARE THE PARTICULARITY REQUIREMENTS OF THE FOURTH AMENDMENT IN THE CONTEXT OF A COURT ORDER AUTHORIZING INTERCEPTION OF TELEX COMMUNICATIONS AND WHETHER THE CONSTITUTIONAL PROPRIETY OF SUCH INTERCEPTIONS SHOULD BE ASSESSED WITH REFERENCE TO CERTAIN PROVISIONS OF TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, 18 U.S.C. §2501 ET SEQ.

WHAT ARE THE PARTICULARITY REQUIREMENTS OF THE FOURTH AMENDMENT WITH RESPECT TO THE ITEMS TO BE SEIZED IN THE CONTEXT OF A BUSINESS DOCUMENT SEARCH AND ARE THOSE REQUIREMENTS MET BY A LISTING OF GENERICALLY DESCRIBED DOCUMENTS WHICH IS LIMITED ONLY BY CITATIONS TO STATUTES AND REGULATIONS WHICH ENCOMPASS A BROAD RANGE OF CRIMINAL ACTIVITY IN A COMPLEX REGULATORY SCHEME.

WHETHER PROBABLE CAUSE TO BELIEVE A BUSINESS IS PERMEATED WITH ILLEGAL ACTIVITY JUSTIFIES "OVERSEIZURE" OR SEIZURE OF ITEMS BEYOND THE SCOPE OF THE WARRANT AND NOT RELEVANT TO THE CRIMINAL ACTIVITIES FOR WHICH THERE EXISTS PROBABLE CAUSE AND UNDER WHAT CIRCUMSTANCES IS EXTENDED SEIZURE OF ITEMS, RETAINED FOR THE PURPOSES OF PROTRACTED SEARCH, PERMISSIBLE.

WHAT IS THE EXTENT OF THE RELIEF THAT SHOULD BE ORDERED WHEN THERE EXISTS A

SUBSTANTIAL "OVERSEIZURE" WHICH RESULTS FROM AN OVERLY BROAD SEARCH WARRANT OR FROM IMPROPER EXECUTION OF AN OTHERWISE VALID WARRANT.

WHETHER EXTENSIVE AND WARRANTLESS SEARCHES OF A DEFENDANT'S TRASH MEET THE CONSTITUTIONAL REQUIREMENTS EMBODIED IN THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

WHETHER A TRIAL COURT'S REFUSAL TO ADMIT INTO EVIDENCE REGULATIONS WHICH THE CRIME CHARGED REQUIRES THE DEFENDANT TO HAVE SPECIFICALLY INTENDED TO VIOLATE CONTRAVENES SIXTH AMENDMENT RIGHTS TO COMPULSORY PROCESS AND WHETHER EXCLUSION OF SAID EVIDENCE VIOLATES THE DEFENDANT'S FIFTH AMENDMENT RIGHTS OF DUE PROCESS OF LAW.

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Missouri addressing suppression issues was decided and filed on February 15, 1986. This opinion is reported at 620 F.Supp. 958 (W.D.Mo. 1986), and is set forth in the Appendix at A22 through A42. The Opinion of the United States Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, was decided and filed on September 22, 1987. That opinion is reported at 829 F.2d 1430 (8th Cir. 1987), and is set forth in the Appendix at A1 through A21.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1987, affirming Petitioners' convictions.* Petitioners timely filed a Motion for Rehearing by Panel, which was denied by the Court of Appeals on October 30, 1987.

On December 17, 1987, Petitioners filed a timely request for extension of time in which to file their Petition for Writ of Certiorari. On December 21, 1987, Honorable Justice Blackmun granted said request and authorized the filing of said Petition up to and including January 8, 1988. This Petition is filed in timely compliance therewith.

This Court has jurisdiction pursuant to 28 U.S.C. §§1254(1) and 2101(c). The District Court had jurisdiction over this cause pursuant to 18 U.S.C. §3231.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment IV ..... See Appendix, A44

United States Constitution Amendment V ..... See Appendix, A44

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*Petitioner Werner Ernst Gregg was convicted upon trial by jury of three counts of export violations (22 U.S.C. §2778), one commerce violation (50 U.S.C. §2410) and two counts of false statements (18 U.S.C. §1001). He was acquitted on one count of export violations and one count of commerce violation and four counts of income tax evasion.

Petitioner Roswitha L. Gregg entered a conditional plea to two counts of income tax evasion pursuant to Rule 11(a)(2) F.R.Cr.P. subject to resolution on appeal of the suppression issues. The appellate court proceedings were consolidated.

United States Constitution Amendment VI ..... See Appendix, A44

STATUTES INVOLVED

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22 U.S.C. §2778 ..... See Appendix, A50

50 App. U.S.C. §2410 ..... See Appendix, A53

REGULATIONS INVOLVED

22 C.F.R. §121.1**

15 C.F.R. §399.1**

STATEMENT OF CASE

The petition before the Court is a joint petition involving Werner Ernst Gregg and Roswitha L. Gregg, husband and wife. They were individually named in a thirteen count Indictment that was returned in the Western District of Missouri in February of 1985. In February of 1986, the trial court ordered the two defendants severed for separate trials. Werner Ernst Gregg was tried and convicted of seven of the thirteen counts against him, which included four counts of violating 22 U.S.C. §2778, one count of violating 50 U.S.C. §2410, and two counts of violating 18 U.S.C. §1001. On April 10, 1986, Roswitha L. Gregg entered nolo contendere pleas to two tax violation counts and all other counts against her were dismissed. Pursuant to these convictions, Werner Ernst Gregg was sentenced to an aggregate of three years and a $200,000.00

**The texts of the regulations involved are of such magnitude, involving several hundred pages, that they have not been included in the Appendix. Should this Court so request, however, Petitioners will promptly provide same.

fine.[1] Roswitha L. Gregg was given an aggregate sentence of six months, a consecutive probationary term and a $4,000.00 fine. Both Petitioners sought appellate review in the Eighth Circuit Court of Appeals,[2] which court affirmed the judgments of conviction.

In 1976, Petitioner Werner Ernst Gregg formed an export brokering business known as Gregg International, which specialized in the exportation of products related to aviation electronics or "avionics". In September of 1982, Werner Ernst Gregg and Gregg International became the subject of a federal investigation when a former employee informed authorities that Petitioner Werner Ernst Gregg, in 1980, had exported a T.O.W. missile system without proper license. In February of 1984, Customs Agents began paying local trash haulers to put the trash from Petitioners' home and business in special bags and deliver it to the agents who would then sort through the trash. These trash searches continued on a regular basis until the end of July, 1984.

The government, on March 19, 1984, applied for an order pursuant to Rule 41 of the Federal Rules of Criminal Procedure authorizing them to conduct electronic surveillance of a telex machine[3] operated at Gregg Inter-

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1. Mr. Gregg is presently confined in the Federal Medical Center for Prisoners at Springfield, Missouri.

2. Werner Ernst Gregg's appeal involved the search and seizure issues raised at the trial court below as well as trial issues. Roswitha L. Gregg's appeal was based solely upon the search and seizure issues. Relative to the Fourth Amendment issues, there has been no dispute in the lower courts as to the standing of both parties.

3. A telex is a communication system which uses teletypewriters that, through a modem, are capable of sending and receiving written messages by electronic impulses that are transmitted by telephone lines or microwave transmissions.

national. The order issued by the U.S. Magistrate read as follows:

> There is probable cause to believe that Werner Gregg doing business as Gregg International, and others yet unknown, have committed or are committing offenses involving Title 50 U.S.C. Appendix Section 2401 et seq; Title 22 U.S.C. Section 2778; Title 18 U.S.C. Section 371 . . . . Wherefore, it is hereby ordered that special agents of the United States Customs Service, United States Department of Treasury are authorized to intercept the telex communications of Werner Gregg, doing business as Gregg International, and others yet unknown, concerning the offenses specified hereinabove in the premises located at 8647 Raytown Road, Raytown, Missouri . . . .

The order was renewed on April 30, 1984, May 24, 1984, and on June 28, 1984.[4] Pursuant to these orders, three thousand four hundred fifty-nine (3,459) telex communications were intercepted; one thousand two hundred thirty-six (1,236) of which involved the companies or products named in the affidavits. Testimony at the evidentiary hearing on Petitioners' motion to suppress indicated the remaining telexes involved legitimate transactions.

In September of 1984, search warrants were issued for Petitioners' residence and business. The description in said warrants read as follows:

> documents that consist of sales, invoices, shipping papers, purchase orders, correspondence, payment rec-

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4. The interceptions occurred continuously throughout this four month period, except for brief occasions when the equipment was malfunctioning or renewal orders were being sought.

> ords, and telexes relating to the purchase, sale storage, transportation and financing of merchandise exported or to be exported from the United States in violation of the United States Export Administration Regulations, Parts 371, 372, 373, 386, 387 and Titles 22 U.S.C. 2778, 50 U.S.C. 1702, 50 U.S.C. 1705 and Presidential Executive Order 12470 of March 30, 1984.

On September 13, 1984, these warrants were executed by Customs Agents and local law enforcement personnel. The officers seized virtually all business documents they could locate and made no attempt to scrutinize them with reference to the warrants. Thousands of documents filling over one hundred boxes, many of which documents were wholly irrelevant to the investigation were seized. The case agent in charge of the searches characterized the executing officers' activities as "painting with a broad brush." Subsequent to the seizure, upon request of Petitioners' counsel, certain documents determined by the government to be irrelevant were returned to the Petitioners. The seizure of documents was so massive that, at the time of the hearing on the motion to suppress, over nine months later, Customs Agents were still examining the seized documents to determine their relevancy.

Subsequent to Indictment, the Petitioners filed a motion to suppress alleging, *inter alia*: (1) that the trash searches that occurred violated the Fourth Amendment; (2) that the telex intercept orders were invalid because the provisions of Title III were not followed; (3) that electronic surveillance pursuant to Rule 41 should at least meet the particularity requirements of Title III and did not; (4) that the orders and warrants themselves lacked particularity sufficient for the Fourth Amendment; and

(5) that there were substantial overseizures of conversations and documents due either to overly broad warrants and orders or improper execution.

The district court held a lengthy evidentiary hearing after which the court issued an order stating its intent to overrule the motion to suppress. In February of 1987, the district court issued a formal opinion denying the motion to suppress. See, *United States v. Gregg,* 629 F.Supp. 958 (W.D.Mo. 1986).

The district court found that the telex interceptions did not involve the "aural" acquisition of Petitioner's communications as then required by 18 U.S.C. §2510(4), and that Title III was therefore not applicable.[5] The court's decision was premised upon strict statutory construction and it noted that it was "anomalous to have detailed statutory regulation of bugging and wiretapping but not of other intrusive interceptions such as . . . the telex interceptions at issue." In addressing Petitioners' claims in the context of the Fourth Amendment, the court found that the "telex warrants were indiscriminate in the respect that all communications were seized . . .", but were proper as probable cause existed to believe the Petitioners' business was permeated with criminal activity. The court noted, however, that Petitioners' "most cogent" argument regarding particularity was their assertion that the warrants' authorization of interception of all business communications was improper and that the intercepted communications should have been minimized.

The district court also found the search warrants' description to be sufficiently definite for the searching

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5. As indicated at note 13, *infra*, 18 U.S.C. §2518(4) has been amended to include telex interceptions.

agents to determine the items to be seized. The court noted that the language of the warrants was not overbroad and that the warrants were executed by, among others, Customs Agents who had adequate training to enable them to identify the described documents. The court also found that the seizure was not overbroad given the large quantity of documents generated by the business and the suspected breadth of the business's criminal activity.

In February of 1986, Petitioner Werner Ernst Gregg was tried by a jury and convicted of alleged violations of 22 U.S.C. §2778 and 50 U.S.C. §2410, both of which require that the government prove beyond a reasonable doubt that the defendant had the specific intent not to follow a set of complex regulations regarding exports. Title 22 U.S.C. §2778 makes it a crime for a defendant to willfully and knowingly export or attempt to export any item on the State Department's Munitions List (22 C.F.R. §121), without the proper export license. Similarly, 50 U.S.C. §2410, makes it a crime for a defendant to willfully and knowingly export or attempt to export any item contrary to the licensing requirements dictated by the Commodity Control list, 15 C.F.R. §399.1. To meet its burden of proof, the government adduced evidence from government employees that the charged items were in fact contained within the Munitions or Commodity Control list and therefore subject to certain licensing requirements. Petitioner was not allowed to introduce expert testimony contrary to the government's evidence nor to introduce the regulations themselves into evidence.[6] The "elements instructions" given the jury required factual findings that coin-

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6. Petitioner Werner Ernst Gregg chose not to testify at trial.

cided with the government's interpretation of the regulations.

On appeal to the Eighth Circuit, both Petitioners addressed the search and seizure issues that were cited in the motion to suppress and ruled upon by the district court. The briefs of the parties as well as the oral argument that occurred before the circuit court stressed issues of minimization, particularity and overseizure. On the 22nd day of September, 1987, the Eighth Circuit Court of Appeals issued its opinion. See, *United States v. Gregg*, 829 F.2d 1430 (8th Cir. 1987). Relative to the search issue, the Eighth Circuit basically made two holdings: that the trash searches were valid and provided probable cause for the other seizures and that the telex intercepts as a matter of statutory construction were not subject to the specific statutory protections of Title III.[7] The Eighth Circuit in its opinion did not address the issues of minimization, particularity, and overseizure.[8] Both Petitioners in a timely fashion filed a joint motion for rehearing suggesting that the court had not fully addressed what Petitioners felt to be the key issues in the case. That motion for rehearing was denied on October 30, 1987.

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7. See notes 5, *supra*, and 13, *infra*.

8. The Eighth Circuit appeared to labor under the misconception that Petitioners' constitutional claims with respect to the telex interceptions and the search warrants were wholly dependent upon the propriety of the trash searches and the applicability of Title III. The Eighth Circuit accordingly limited its discussion to the propriety of the trash searches and the inapplicability of Title III. This misconception was brought to the appellate court's attention in Petitioners' motion for rehearing, but the court did not seize upon the opportunity to correct the situation.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's Failure to Recognize the Applicability of the Fourth Amendment Particularity Requirement to Court Ordered Interception of Telex Communications and Its Refusal to Use Title III Warrant Requirements As a Guide to Assessing Whether Constitutional Particularity Exists Conflicts With the Decisions of This Court.

It is incontrovertible that, in accordance with this Court's decisions in *Osborn v. United States,* 385 U.S. 323, 329-330, 87 S.Ct. 429, 488, 17 L.Ed.2d 394 (1966); *Berger v. New York,* 388 U.S. 41, 58-59, 87 S.Ct. 1873, 1883-84, 18 L.Ed.2d 1040 (1967); and, *Katz v. United States,* 389 U.S. 347, 354-59, 88 S.Ct. 507, 512-16, 19 L.Ed.2d 576 (1967), the interception and acquisition of telex communications is a search and seizure within the meaning of the Fourth Amendment.

In *Osborn v. United States, supra,* the Court sustained the validity of court authorized use of concealed electronic devices under "sufficiently precise and discriminate circumstances" for "narrow and particularized purposes. . .". 388 U.S. at 57, 87 S.Ct. at 1882.[9]

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9. The *Osborn* Court found the surveillance carried certain safeguards which protected the Petitioner's Fourth Amendment concerns. Those safeguards included, *inter alia,* "the order describing the type of conversations sought with particularity, thus indicating the specific objective of the government in entering the constitutionally protected area and the limitations placed upon the officer executing the warrant." As this Court noted in *Berger v. New York,* the "through those protections (in *Osborn*), 'no greater invasion of privacy was permitted than was necessary under the circumstances.' " 388 U.S. at 57, 87 S.Ct. at 1882.

In *Berger v. New York*, this Court struck down a New York wiretapping and eavesdropping statute which permitted seizure of "the conversations of any and all persons coming into the area covered by the device . . . indiscriminately and without regard to their connection to the crime under investigation." This, the Court held, was the electronic equivalent of a general search. 388 U.S. at 58, 87 S.Ct. at 1883. The statute's failure to require the conversations sought be described with particularity gave officers "a roving commission to seize any and all conversations." 388 U.S. at 59, 87 S.Ct. at 1883.[10]

In *Katz v. United States, supra*, the Court found the Fourth Amendment violated by the use of electronic surveillance without prior judicial authorization. In so doing, the Court noted that an important aspect of the warrant requirement is it ensures that the officers executing the warrant are "compelled during the conduct of the search itself, to observe precise limits established in advance by specific court order." 389 U.S. at 356, 88 S.Ct. at 514.

Berger, *Katz* and *Osborn* embody the minimum constitutional standards governing the use of electronic surveillance. Petitioners contend that these prerequisites to a constitutionally valid electronic search and seizure were not met in the case at bar. To the extent the Eighth Circuit's decision sanctions the use of electronic surveillance in the context of telex interceptions without re-

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10. The *Berger* Court emphasized the constitutional principle that all invasions of privacy must be limited in scope to the minimal intrusion necessary to fulfill their purpose. 388 U.S. at 47, 87 S.Ct. at 1882-83. The Court stated "[t]hat the need for particularity . . . is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope." 388 U.S. at 56, 87 S.Ct. at 1882.

quiring these standards be met, it is clear it conflicts with the decisions of this Court.[11]

Petitioners challenged not only the authorization for the telex interceptions, but also the execution of the orders for same on the grounds that there were no efforts whatsoever taken toward minimization. The district court found this to be Petitioners' "most cogent argument." In the context of electronic surveillance falling within the purview of Title III, minimization exists as a regulatory mechanism used to avoid indiscriminate, unlimited and uncontrolled surveillance; or what should be considered to be an unconstitutional general search in the context of electronic surveillance. The minimization requirement and/or the particularity requirements of the Fourth Amendment in the context of electronic surveillance derives from the court's holdings in *Berger, Katz* and *Osborn*. The Eighth Circuit's refusal to recognize the arguments of Petitioners in that regard also brings its decision in conflict with the decisions of this Court.

The Eighth Circuit's Failure to Utilize the Particularity Requirements of Title III As a Guide to Determining the Constitutionality of Court Ordered Interceptions of Telex Communications Conflicts With the Decisions of Other Federal Courts of Appeal.

The Court of Appeals limited its inquiry to the applicability per se of Title III to the telex interceptions and

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11. In addition, because of the abundant evidence to support the conclusion that Congress specifically intended to adopt the constitutional guidelines announced in *Berger, Katz* and *Osborn* when it passed Title III, S.Rep. No. 1097, 90th Cong. 2d Sess. 66 (1968), reprinted in 1968 U.S. Code Cong. & Ad. News 2112, 2153-63. Petitioners urge, as they did in the lower courts, that the appellate and district courts' failure to assess the situation using Title III as a guideline, further serves to bring the Court's decision in to conflict with the decisions of this Court.

disregarded Petitioners' arguments that, irrespective of whether the interceptions fell strictly within the purview of Title III, certain portions of Title III should be considered in assessing the constitutionality of those interceptions.[12] The Court of Appeals noted only that the government failed to follow the procedures for obtaining court approval for interception as provided in Title III (18 U.S.C. §2516-19), but did not address the constitutional ramifications of the government's failure to do so.

Unlike the Eighth Circuit Court of Appeals, the Circuit Courts of Appeal for the Seventh, Fifth and Second Circuits have seized upon the warrant procedures of Title III (18 U.S.C. §2518), as guidelines by which to assess the constitutional propriety of television surveillance. *United States v. Torres,* 751 F.2d 875, 885 (7th Cir. 1984), *cert. denied,* 470 U.S. 1087, 105 S.Ct. 1853, 85 L.Ed.2d 150 (1985); *United States v. Biasucci,* 786 F.2d 504, 510 (2d Cir.), *cert. denied,* ..... U.S. ....., 107 S.Ct. 104, 93 L.Ed.2d 54 (1986); *United States v. Cuevas-Sanchez,* 821 F.2d 248, 252 (5th Cir. 1987).

In *Torres,* Judge Posner, writing for the Seventh Circuit, noted that Title III was Congress's carefully thought out and constitutionally valid effort to implement the requirements of the Fourth Amendment with regard to the necessarily unconventional type of warrant that is

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12. Those provisions include, *inter alia,* that the warrant contain a "particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates," 18 U.S.C. §2518(4)(c); and that it require the interception "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under (Title III)," 18 U.S.C. §2518(5). Title III also mandates that the judge issuing the warrant must find "that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. §2518(3)(c). No such finding was made in the present case.

used to authorize electronic eavesdropping, noting that this type of search was more indiscriminate than a conventional physical search and, therefore, thought to pose a greater potential threat to personal privacy. Finding that television surveillance was identical in its indiscriminate character to wiretapping and bugging, the court borrowed the warrant procedure of Title III, "a careful legislative attempt to solve a very similar problem" and held that it "provides the measure of the government's constitutional obligation of particular description" in the context of electronic surveillance, including television surveillance.

Both the Second Circuit in *Biasucci* and the Fifth Circuit in *Cuevas-Sanchez* adopted the rationale of *Torres* in similar situations.

Petitioners urged both lower courts to similarly look to Title III as a definable standard by which to assess their Fourth Amendment claims of particularity in the context of telex interceptions. The circuit court's failure to recognize the viability of those particular standards in the context of telex interceptions conflicts with the decisions of the Second, Fifth and Seventh Circuit Courts of Appeal.[13]

The Eighth Circuit's Opinion Regarding the Particularization Issue Is in Conflict With the Decisions of This Court.

The decision of the Eighth Circuit Court of Appeals condones and sanctions the use of search warrants and

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13. It further serves to exacerbate the anomalous effect created by the recent amendment of 18 U.S.C. Section 2510(4) to read "aural or other" acquisition, Electronic Communications Privacy Act of 1986, see Congressional Record, Vol. 123, No. 134—Prt II, October 2, 1986, H8977. Said amendment indicates that the statute's failure to originally include telex interceptions was more a matter of not foreseeing technological advances that intentional design.

Rule 41 court orders where the only limitations of the seizure depend upon the discretion of the executing officer and undermine the purposes of the particularity requirement.

> The problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings . . . [the Fourth Amendment addresses the problem] by requiring a "particular description" of the things to be seized. *Coolidge v. New Hampshire,* 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971). This requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Stanford v. Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 512, 13 L.Ed.2d 431 (1965), quoting *Marron v. United States,* 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927). *Andresen v. Maryland,* 427 U.S. 463, 480, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976).

The holding in *Marron v. United States, supra,* often quoted by its progeny, reflects two of the important purposes underlying the particularity requirement of the Fourth Amendment—preventing general searches and preventing the seizure of objects upon the mistaken assumption that they fall within the magistrate's authorization. In this case, the purposes were effectively undermined by the lack of particularization of the intercept orders and search warrants.

In the present cause, officers executing the intercept orders seized all telex communications occurring at Peti-

tioners' business for virtually the entire period of time the court orders authorizing same were in force. With respect to the execution of the search warrants, all business documents of the Petitioners located at their home and office were also seized. In neither instance did the intercept orders or search warrants expressly authorize the seizure of "all" telexes or "all" business documents of Gregg International. The orders and warrants in question did, however, effectively grant a carte blanche equivalent to such a general authorization by failing to place any meaningful limitation on the seizure of otherwise innocuous items.

In this case, the only limitation the orders and warrants place on the seizures of telexes and business documents is that they relate to illegal activity which is described in the intercept orders only by citations, and in the search warrant only by citations and the phrase "United States Export Regulations". The statutes cited in the intercept orders are 50 U.S.C. App. §2401 et seq., 22 U.S.C. §2778 and 18 U.S.C. §371. In the search warrants there are similar citations to statutes of considerable breadth which envision intentional violation of the technical provisions of numerous export regulations. Certain of those regulations are cited, five in all, as is a presidential executive order. Collectively, these citations encompass an extremely broad range of regulations and laws, violations of which extend the entire gambit of potential illegal export activity. Accordingly, the orders and warrants, on their face, call for executing officers to exercise their discretion to determine the nature and extent of the illegal activity under investigation and to determine whether the general items described in those documents, which are innocent on their face, are in fact evidence of

such illegal activity.[14] Because the warrants and orders rely on the exercise of the executing officer's discretion,[15] they are in conflict with the precedents of this Court.

Petitioners have consistently maintained that the search warrants and court orders in question were overly broad on their face, or greater than the probable cause

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14. A number of the circuit courts of appeal have recognized that mere reference to the type of criminal activity under investigation or a citation will not suffice for a meaningful limitation on the exercise of the officer's discretion. See, e.g. *Voss v. Bergsgaard*, 774 F.2d 402, 405 (10th Cir. 1985) ("Even if reference to 18 U.S.C. Section 371 is construed as a limitation, it does not constitute a constitutionally adequate particularization of the items to be seized."); *United States v. Roche*, 614 F.2d 6, 8 (1st Cir. 1980) (Limiting search to evidence regarding violation of 18 U.S.C. Section 1341 provided "no limitation at all" because of the statute's extremely broad scope); *In re Lafayette Academy*, 610 F.2d 1, 3 (1st Cir. 1979) (Search warrant limited to evidence of violations of Title 18 U.S.C. Sections 286, 287, 371, 1001 and 1014 too broad); *United States v. Spilotro*, 800 F.2d 959, 964 (9th Cir. 1986) (reference to thirteen statutes, some of exceptional scope, encompasses a number of criminal acts but does not describe a specific criminal transaction and is not a meaningful limitation). But see, *United States v. Timpani*, 665 F.2d 1, 4-5 (1st Cir. 1981) (Search warrant that refers to loan sharking and gambling in addition to listing four federal statutes sufficiently particular).

15. Petitioners recognize that courts tend to accord a great deal of latitude in the application of the *Marron* rule, but would nonetheless assert that it remains violated in the present context. In this case, the items in question were not contraband, but were innocent on their face, and nowhere in the warrants does there appear any guidelines or criteria by which to distinguish that which is evidence of criminal activity. Moreover, the fact that the warrants and orders could have been narrowed and refined by virtue of the prior investigation to specific instances of criminal conduct involving identified parties and products, as well as time frames, they were not so limited. Petitioners would accordingly maintain, as they have, that not only are these orders and warrants in conflict with *Marron* and progeny, but also, specifically, with *Andresen v. Maryland, supra*, wherein this Court indicated that consideration should be given to the fact the warrant in that case was limited to a specific transaction and the description contained therein was the best that could be accomplished under the circumstances. 427 U.S. at 481 n.10, 482-3, 96 S.Ct. at 2748 n.10, 2749.

established by their affidavits, as well as being insufficiently particularized, and to that extent Petitioners assert that the Eighth Circuit's decision is inconsistent with this Court's decision in *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931), wherein this Court indicates that the third purpose underlying the particularity requirement, not mentioned in *Marron*, is to prevent "the issuance of warrants on loose, vague or doubtful basis of fact."

In accordance with the foregoing, Petitioners respectfully assert that the decision of the Eighth Circuit Court of Appeals[16] to uphold the warrants and orders in question conflicts with the precedents of this Court.

Whether Probable Cause to Believe a Business Is Permeated With Illegal Activity Justifies Overseizure Beyond the Scope of the Warrant Is an Issue on Which the Circuit Courts of Appeal Are Not in Agreement.

In the present case, Petitioners challenged the seizure of all telex communications for a four month period and seizure of all Petitioners' business documents as being overseizures, seizures beyond the scope of the warrants which themselves were overly broad. In response thereto,

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16. The district court found that the search warrants in question were sufficiently particular to enable the search agents to determine the items to be seized. 629 F.Supp. at 966. In so doing, the district court relied upon its finding that the primary searcher was a customs agent who had adequate training to enable them to identify the described documents. The court's decision to validate the breadth of the warrant by reference to the manner in which execution took place ignores Petitioners' allegations that the warrants were overly broad on their face. The court's use of events taking place subsequent to issuance is also contrary to the position of the First Circuit Court of Appeals in *In re Application of Lafayette Academy, Inc., supra*, which held that limited execution of a search warrant which is facially invalid will not serve to validate the warrant.

the district court found that such seizures were permissible because virtually all items seized were of a business nature and because there was probable cause to believe the Petitioners' business was permeated with illegal activity.[17]

A majority of the circuit courts of appeal have upheld the large-scale seizure of business documents where a warrant expressly, or in effect, authorizes seizure of all the documents of a business entity upon probable cause to believe the business is permeated with crime or involved in a pervasive scheme to defraud. *United States v. Brien*, 617 F.2d 299 (1st Cir.), *cert. denied sub nom.*, 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 273 (1980); *United States v. Offices Known as 50 State Distributing Co.*, 708 F.2d 1371 (9th Cir. 1983), *cert. denied*, 465 U.S. 1021, 104 S.Ct. 1272, 79 L.Ed.2d 677 (1984); *United States v. Sawyer*, 799 F.2d 1494 (11th Cir. 1986), *cert. denied sub nom.*, ... U.S. ....., 107 S.Ct. 961, 93 L.Ed.2d 1009 (1987); *National City Trading Corp. v. United States*, 635 F.2d 1020, 1026 (2d Cir. 1980); *Williams v. Kunze*, 806 F.2d 594 (5th Cir. 1986); *Rickert v. Sweeney*, 813 F.2d 907 (8th Cir. 1987).

To the extent that these cases can be read as allowing seizure of all an organization's records whether or not those records are relevant to the alleged crimes, they are in conflict with the holding of the Tenth Circuit Court of Appeals in *Voss v. Bergsgaard, supra.*[18] See too, *United*

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17. Petitioners assert this finding to be clearly erroneous and have vigorously opposed it throughout the course of this litigation. Petitioners accordingly maintain the scope of the telex and document seizures, in effect and as authorized, outran the probable cause provided by the respective affidavits.

18. In *Voss v. Bergsgaard, supra*, the warrant authorized seizure of a number of specifically listed generic documents

(Continued on following page)

States v. Roche, supra, wherein the First Circuit held that wholesale seizure would not be condoned because the fraudulent activity, though substantial could be segregated from other legitimate activities of the organization.[19]

Footnote continued—

limited only by broad statutory reference, pursuant to which, virtually all documents of the business were seized. The court found the warrant to be unduly broad and noted the district court found probable cause for issuance of a properly restricted warrant and did not find probable cause to believe that fraud pervaded every aspect of the particular business. The court went on to state, however, that it declined to follow case law which would authorize such a wholesale seizure even if there was probable cause to believe the business was pervasively criminal. The court noted that seizure of all a business's records might lawfully occur where they all fall with the particular description of documents relevant to a specific crime, but that a warrant which authorizes seizure of all files, expressly or in effect, whether or not relevant to a specific crime is insufficiently particularized. 774 F.2d at 406.

19. The issue of overseizure implicates the related issue of "extended seizure" and the circumstances in which it is constitutionally palatable. See, *United States v. Tamura,* 694 F.2d 591 (9th Cir. 1982), where agents seized all records of a business as a matter of convenience and conducted the search of those records for an extended period of time thereafter. The circuit court held that such methodology in executing a search was the "kind of investigatory dragnet the Fourth Amendment was designed to prevent." 694 F.2d at 595, quoting, *United States v. Abrams,* 615 F.2d 541, 543 (1st Cir. 1980). Recognizing the constitutional problems of extended seizure, even if necessary for practical reasons, the American Law Institute's Model Code of Pre-Arraignment Procedure sets forth recommended procedures which include, *inter alia,* prior judicial authorization for the large scale removal of material. See, Article 220 of the 1975 ALI Model Code of Pre-Arraignment Procedure. In *Tamura,* the court found that the lack of prior judicial authorization for the manner in which that warrant was executed rendered it an unreasonable seizure and violative of the Fourth Amendment. But see, *United States v. Santarelli,* 778 F.2d 609 (11th Cir. 1985), where the court approved wholesale seizure for several *days* needed to examine documents so long as any items found not be relevant were promptly returned because said procedure was reasonable under the circumstances. 778 F.2d at 615-16.

The Extent to Which Relief Should Be Granted From an Overseizure Is an Important Question of Law Which Should Be Addressed by This Court.

It is well established that the Fourth Amendment prohibits a general search. *Marron v. United States, supra.* The question which appears unanswered by existing Supreme Court precedent is whether total suppression is appropriate if the search warrant is overly broad on its face. The Eighth, Ninth and Tenth Circuit Courts of Appeal have answered that question affirmatively and recognized that search warrants overly broad on their face may not be susceptible to severance and suppression of all fruits of the search is therefore required. *Rickert v. Sweeney, supra,* 813 F.2d at 909-910; *United States v. Spilotro, supra,* 800 F.2d at 964; *Voss v. Bergsgaard, supra,* 774 F.2d at 406.[20] Similarly, is substantial overseizure pursuant to a warrant not overly broad on its face equivalent to a general search thus requiring total suppression? Because the deterrent purpose of the exclusionary rule would be effectively emasculated if these queries were to be answered in the negative and wholesale rummaging would be encouraged, Petitioners urge this Court to ad-

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20. The scope of the suppression remedy in the event of a violation of the minimization requirement for electronic surveillance, on both constitutional and statutory grounds, is open to this Court. See, *Scott v. United States,* 436 U.S. 134, 136 n.10, 98 S.Ct. 1717, 1722 n.10, 56 L.Ed.2d 168, *rehrg. denied,* 438 U.S. 908, 98 S.Ct. 3127, 57 L.Ed.2d 1150 (1978). See too, *United States v. Turner,* 528 F.2d 143, 156 (9th Cir.), *cert. denied,* 423 U.S. 996, 96 S.Ct. 426, 46 L.Ed.2d 371 (1975), where in the context of electronic surveillance, the court indicated that disregard of the minimization requirement, which is overseizure, might appropriately result in total suppression.

dress the issues of suppression attendant on Petitioners' Fourth Amendment claims.[21]

Whether Extensive and Warrantless Searches of Defendants' Trash Meet the Requirements of the Fourth Amendment Is an Important Issue This Court Should Address.

In both the district court and in the Eighth Circuit Court of Appeals, Petitioners urged that the indiscriminate trash searches which occurred in this cause violated their Fourth Amendment rights. Petitioners are aware of the fact that this Honorable Court has granted certiorari in the case of *California v. Greenwood*, No. 86-684, 107 S.Ct. 3260 (1987). The pending *Greenwood* case addresses issues similar to those raised by Petitioners in the court below and therefore is an important question of law that should be addressed by this Honorable Court.

The Exclusion of Certain Evidence Regarding Export Regulations and the Interpretation Thereof Has Significant Constitutional Impact and Is Contrary to Supreme Court Precedent.

Werner Ernst Gregg was convicted of seven counts in a thirteen count Indictment. Five of those seven counts were violations of either 22 U.S.C. §2778 or 50 App. U.S.C. §2410. Both such statutes make it a crime to willfully

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21. Petitioners recognize that the applicability of the good faith exception to the exclusionary rule as enunciated in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677, *rehrg. denied*, 468 U.S. 1250, 105 S.Ct. 52, 82 L.Ed.2d 942 (1984), is a matter which is necessarily implicated by the scope of suppression issue. Petitioners have maintained throughout the course of these proceedings that the good faith exception is not applicable to the circumstances of this case and would respectfully reserve the right to brief that issue should certiorari be granted.

and knowingly violate export licensing regulations, which regulations are complex and subject to varying interpretation. The issues subject to interpretation is whether a particular product was on either the Commodity Control List, 15 C.F.R. §399.1 or on the State Department's Munitions List, 22 C.F.R. §121.1. The elements instructions given at the end of the case required the jury to make factual findings that various items fell within the purview of either the Munitions List or the Commodity Control List.[22]

At trial, the government presented expert testimony to support the interpretations necessary to its allegations. Petitioner introduced documentary evidence which indicated that his interpretations of the regulations were contrary to the governments. Petitioner also offered the testimony of three experts to support Petitioner's interpretations. Petitioner further offered into evidence the various regulations that apply to offenses under 22 U.S.C. §2778 and 50 App. U.S.C. §2410, including those regulations specific to the charges. The trial court refused to admit into evidence said testimony and regulations.

Existing case law indicates that export violations such as those of which Petitioner was convicted are specific intent crimes. See, *United States v. Lizarraga-Lizarraga,* 541 F.2d 826 (9th Cir. 1976). The government must prove, therefore, that the regulatory provisions were both "actually known" and "deliberately violated" by the de-

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22. Defendant was convicted of Counts I, II, III and IV relating to what are called "Munitions List offenses", 22 U.S.C. §2778. The defendant was also convicted of Count VII relating to a Commodity Control List offense, 50 App. U.S.C. §2410. With respect to each count, the issue arises as to whether the particular product named in that count is contained in the items described by the particular list and is therefore subject to certain licensing requirements.

fendant. *United States v. Fuentes-Coba,* 738 F.2d 1191 (11th Cir. 1984), *cert. denied,* 469 U.S. 1213, 105 S.Ct. 1186, 84 L.Ed.2d 333 (1985). Accord *Liporata v. United States,* 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985). Petitioner respectfully asserts that notions of fundamental fairness, as well as his constitutional right to compulsory process in presenting a defense are violated when the defendant is not allowed to offer evidence in rebuttal of proposition the government must directly prove.

Exclusion of this evidence cannot be justified by the circuit court's suggestion that it was an attempt to confuse the issues. To the extent that such a holding is allowed it remains in conflict with this Court's recent decision in *Crane v. Kentucky,* 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 630 (1986), which reaffirmed the proposition that exclusion of potentially exculpatory evidence without sufficient justification violates a defendant's Sixth Amendment rights, which includes the defendant's right to compulsory process. *Washington v. Texas,* 388 U.S. 14, 19-23, 87 S.Ct. 1920, 1923-28, 18 L.Ed.2d 1019 (1967); *Rock v. Arkansas,* ..... U.S. ....., 107 S.Ct. 2704, ... L.Ed.2d ..... (1987).

Further, it is Petitioner's contention that the exclusion of this evidence denied him a fair trial. Therefore, his Fifth Amendment rights to due process of law were also violated.[23]

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23. Implicitly the Eighth Circuit's opinion seems to uphold the exclusion of this evidence because the Petitioner did not testify. The exclusion of this evidence upon the defendant's failure to testify runs afoul of his right to remain silent as guaranteed to him under the Fifth Amendment of the United States Constitution, see generally, *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, *rehrg. denied,* 381 U.S. 957, 85 S.Ct. 1797, 14 L.Ed.2d 730 (1965).

CONCLUSION

The issues presented in this cause are of significant constitutional magnitude addressing the application of the Fourth and Sixth Amendments. Specifically, these issues include: (1) the particularity requirements for electronic interception of telex communications; (2) the particularity requirements of search warrants in the context of a complex case regarding allegations of business related crimes; (3) what remedies are available to a criminal defendant in the context of substantial overseizure of documents during the execution of a search warrant; (4) the constitutional propriety of warrantless trash searches; (5) the Sixth Amendment rights regarding compulsory process in a prosecution involving complex export statutes and regulations. Clearly these are issues of significant concern to the administration of criminal justice.

The use of search warrants in the substantial seizure of business documents have become commonplace. With advancing technology the government will also have increased opportunity to use novel methods of electronic surveillance. The issues regarding these types of intrusions should be addressed by this Court.

Therefore for the reasons stated this petition should be granted.

Respectfully submitted,

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APPENDIX

(Filed September 22, 1987)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1572/1787WM and 87-1622WM

UNITED STATES OF AMERICA,
Appellee,

v.

WERNER ERNST GREGG and ROSWITHA GREGG,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri,
Western Division

Submitted: June 8, 1987
Filed: September 22, 1987

Before WOLLMAN and MAGILL, *Circuit Judges,* and DUMBAULD,* *Senior District Judge.*

DUMBAULD, *Senior District Judge.*

Appellants, Werner Ernst Gregg and his wife Roswitha Gregg, operated an export business known as Gregg International, handling avionics devices. Both defendants ap-

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*The Honorable Edward Dumbauld, U.S. Senior District Judge of the Western District of Pennsylvania, sitting by designation.

peal from denial of their motion to suppress evidence.[1] Werner Gregg also alleges various trial errors. We affirm the judgments of conviction.

The curious feature of this case is that the customs agents investigating defendants possible violation of export prohibitions first scrutinized trash collected from defendants' residence and place of business, and "found gold" in the form of discarded telex communications between defendants and customers. On the basis of these telexes the agents prepared affidavits which convinced Magistrate Calvin Hamilton that a search warrant should issue authorizing interception of current telex communications of Gregg International.[2] Details of the investigation are described in the opinion of the District Court[3] denying the motion to suppress. *U.S. v. Gregg,* 629 F. Supp. 958 (W.D.Mo. W.D. 1986) at 959-61. As a result of the telex materials, together with subsequent searches of the Greggs' residence and business, customs searches when Werner Gregg was personally attempting to carry merchandise out of the country, and statements taken from the defendants, an indictment containing thirteen counts[4] was returned against both defendants. Werner

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1. Roswitha Gregg entered a conditional plea pursuant to Rule 11(a)(2) F.R.Cr.P. subject to resolution on appeal of the suppression issue. Roswitha Gregg's plea related to tax issues involved in Counts X and XI of the Indictment. Werner Gregg was acquitted on the tax counts (X through XIII). On motion of the United States Counts I through IX and XII and XIII were dismissed as to Roswitha Gregg.

2. Violations disclosed by the trash were too stale for prosecution. Testimony of the case agent Ronald M. Garrison, Tr. I, 133.

3. The Honorable Joseph E. Stevens, Jr., District Judge for the Western District of Missouri.

4. Count I charged unlawful export of night vision goggles usable for military purposes, without a required license from

(Continued on following page)

Gregg was convicted on Counts I-IV, and VII-IX, both inclusive and was sentenced, in the aggregate to three years custody, followed by five years' probation, and a $200,000 fine. Roswitha Gregg was fined $4000 and three years confinement, suspended except for six months. A proviso ordered that husband and wife not be incarcerated simultaneously.

Defendants contend that all evidence seized from them should be suppressed, arguing that each subsequent seizure resulted as the poisonous fruit of prior illegal seizures, and hence that everything must be excluded.

However, as the District Court properly found, this "house that Jack built" argument collapses because the initial trash search was not illegal (629 F. Supp. at 960), citing *U.S. v. Michaels*, 726 F.2d 1307, 1312-13 (8th Cir. 1984); and *U.S. v. Biondich*, 652 F.2d 743, 744-45 (8th Cir. 1981). And in the case at bar as in *Biondich*, "Since we have concluded that the inspection of his garbage was lawful, the magistrate properly considered the items found

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Footnote continued--

the State Department: Count II, of sixteen military aircraft communication radios without State Department license; Count III, of component parts of a T.O.W. missile system without State Department license; Count IV, of a tactical air navigational radio system (often referred to during the case as a TACAN) without State Department license; Count V, of which Werner Gregg was acquitted, charged an attempt to export three radios without State Department license; Count VI, of which defendant Werner Gregg was acquitted, charged export of 31 millimeter wave guide components without validated Commerce Department license; Count VII charged attempt to export a Laser Inertial Navigation System for aircraft (often referred to during the case as a "Laser Nav") without a validated Commerce Department license [this unit was discovered in Werner Gregg's hand-carried luggage at the Los Angeles airport]; Count VIII charged false statement (gross undervaluation) of 25 transceivers; Count IX charged such undervaluation of 43 transceivers; Counts X-XIII were tax counts (understatement of income), as to which Werner Gregg was acquitted.

in the trash when he made his determination that probable cause existed to justify the warrant", (652 F.2d at 745). Once the propriety of taking the result of the trash search into account is established, there is obviously substantial evidence justifying issuance of the warrant. We note also, as recognized in *Michaels* (726 F.2d at 1313-14), that under *Illinois v. Gates,* 462 U.S. 213, 236 (1983), our scrutiny "of the sufficiency of an affidavit should not take the form of *de novo* review". A "substantial basis" for concluding that evidence of wrongdoing will be found is all that is required. As stated in *Massachusetts v. Upton,* 466 U.S. 727, 728 (1984): "[T]he task of a reviewing court is not to conduct a *de novo* determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the Magistrate's decision to issue the warrant".

More interesting, and novel, is the Greggs' contention that interception of telex communication is subject to the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of June 18, 1968, 82 Stat. 112, 18 USC 2510 *et seq.* It is there enacted that

> "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device. [18 USC 2510 (4)].

Evidence obtained by interception is to be excluded if disclosure of the information would be in violation of Title III. 18 USC 2515. Procedure for obtaining court approval for interception is provided in 18 USC 2516-19. Those procedures were not followed in the case at bar.[5]

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5. Although the Government claims that a substantial equivalent of those procedures was observed in its practices.

We agree with the District Court's conclusion (629 F. Supp. at 962) that the printouts of telex communications do not constitute "aural" acquisition of the contents of the communications. Telex communication, unlike telephonic communication, does not involve hearing sounds of the voice. It is more like a pen register or television monitoring. Sight rather than hearing is the means of apprehending the contents.[6] Title III did not apply.[7] There is no merit in any of appellants' arguments in favor of suppressing the evidence.

Turning to the trial errors challenged by appellant Werner Gregg, we find no error in the District Court's rulings. It will be helpful first to set forth the unlawful acts involved in the counts of which defendant Werner Gregg was convicted by the jury.

Counts I-IV charged violations of section 38 of the Foreign Military Sales Act of October 22, 1968, 82 Stat. 1320, as added by Section 212 (a) (1) of the International Security Assistance and Arms Export Control Act of 1976, 90 Stat. 729, 744-45, section 201 (a) of which changed the name of the Foreign Military Sales Act to the Arms Export Control Act [90 Stat. 734], 22 U.S.C. 2778, which provides in pertinent part:

> (a)(1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to

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6. Tom Hilleary, an electrical engineer, defendant's expert, testified that what is heard when a telex is in operation is obviously not speech, but a modulated audio signal. Tr. III, 464, 483. The witness knew of no commercially available equipment that would intercept only particular messages. Tr. III, 499.

7. In 1986 the definition was amended to read "aural or other acquisition." Appellee's brief, p. 15.

provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.[8]

(b)(2) Except as otherwise specifically provided in regulations issued under subsection (a)(1) of this section, no defense articles or defense services designated by the President under subsection (a)(1) of this section may be exported or imported without a license for such export or import, issued in accordance with this chapter and regulations issued under this chapter. . . .

(c) Any person who willfully violates any provision of this section or section 2779 of this title, or any rule or regulation issued under either section, or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $100,000 or imprisoned not more than two years, or both.

It will be noted that allegations of willfulness are contained in every count under which Werner Gregg was

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8. The actual list constitutes part 121 of Title 22, CFR. For items on the Munitions List the Department of State is the licensing authority. See 22 CFR subchapter M, part 120, 120.1, referring to Executive Order 11958, as amended (42 Fed. Register 4311).

convicted. It is also noteworthy that the prosecutors did not utilize the false representation provisions of 22 U.S.C. 2778 (c), but relied on 18 U.S.C. 1001 and 1002.[9]

Count VII involved items for which a license from the Commerce Department was required, and alleged violation of section 11(b) of the Export Administration Act of 1979, 93 Stat. 503, 529, 50 U.S.C. App. 2410, which provides:

> (a) Except as provided in subsection (b) of this section, whoever knowingly violates or conspires to or attempts to violate any provision of this Act [sections 2401 to 2420 of this Appendix] or any regulation, order, or license issued thereunder shall be fined not more than five times the value of the exports involved or $50,000, whichever is greater, or imprisoned not more than 5 years, or both.
>
> (b) (1) Whoever willfully violates or conspires to or attempts to violate any provision of this Act [sections 2401 and 2420 of this Appendix] or any regulation, order, or license issued thereunder, with knowledge that the exports involved will be used for the benefit of, or that the destination or intended destination of the goods or technology involved is, any controlled country or any country to which exports are controlled for foreign policy purposes—
>
> * * *
>
> (B) in the case of an individual, shall be fined not more than $250,000, or imprisoned not more than 10 years, or both.

It will be noted that conviction under this statute requires proof of (1) willfulness; (2) violation of the Act

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9. Perhaps none of the documents Gregg was charged with falsifying in connection with the paperwork involved in the exportation process constituted a "required report."

or a regulation issued thereunder; (3) knowledge that the exports involved will be used for the benefit of, or that the destination or intended destination of the goods or technology involved is, any controlled country or any country to which exports are controlled for foreign policy purposes.

The Court's charge clearly covered these requisites:

> The crime of attempted unlawful export of an item on the Commodity Control List as charged in Count VII of the indictment has two essential elements which are:
>
> One: That the defendant intended to commit the crime of unlawful export of an item on the Commodity Control List; and
>
> Two: That on or about June 25, 1984, the defendant intentionally carried out some act which was a substantial step towards the commission of the unlawful export of an item on the Commodity Control List.
>
> To convict the defendant of an attempted unlawful export of an item on the Commodity Control List, the government must prove each of these essential elements beyond a reasonable doubt. . .
>
> To assist you in determining whether the defendant intended to commit the crime of unlawful export of an item on the Commodity Control List, as required by element one above, you are advised that the elements of the offense alleged in Count VII are as follows:
>
> First, that the defendant attempted to export the item alleged in the indictment;

Second, that the item was listed on the Department of Commerce Commodity Control List;

Third, that the defendant did so with knowledge that such item would be used for the benefit of a country to which exports are restricted for foreign policy purposes;

Fourth, that in so doing the defendant did not possess or have issued to him a validated license or other authorization for such export as required by law; and

Fifth, the defendant did such acts knowingly and willfully. [Instruction #39, Tr. (vol. X) 183-84]

Counts VIII and IX charged violations of 18 U.S.C. 1001 and 1002.[10] Section 1001 of the Act of June 25, 1948, 62 Stat. 683, 749 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be

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10. Section 1002, which obviously relates to falsified documents for the purpose of obtaining money from the government on false pretenses and has no applicability to circumstances such as those in the case at bar, reads:

Whoever, knowingly and with intent to defraud the United States, or any agency thereof, possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

fined not more than $10,000 or imprisoned not more than five years, or both.

Appellant Werner Gregg strenuously contends that it was error not to admit as exhibits for consideration by the jury the Arms Export Control Act, the Export Administration Act, and the voluminous regulations thereunder. The argument is that they are relevant to the question whether specific intent was proved. Like questions of evidence generally, this was a matter for the trial court's discretion.

Strictly speaking, this material would be irrelevant since the crucial issue is not whether the jury would be confused by these massive legislative and bureaucratic artifacts (or even whether the courts would be confused thereby) but *whether Werner Gregg was confused* by them. There was evidence that Gregg possessed considerable expertise on the subject. Indeed he gave lectures and published newsletters on the subject.[11] The trial court's charge admirably sifted out the portions of the statutes and regulations applicable to each count, and the pertinent references to the Munitions List and the Commodity Control List. The court's instructions likewise made it perfectly clear that the Government must prove beyond a reasonable doubt that the defendant acted knowingly and willfully, and with specific intent, and particular knowledge, as required by the respective counts involved.[12]

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11. Tr., VIII, 128, 140-41.

12. The charge is found in Tr. (vol. X) 158-207. After each numbered instruction, the page reference is given in parentheses. #5 (161) [must acquit unless Government proves beyond reasonable doubt that "the defendant has committed every element of an offense"]; #15 (166) [proof of specific intent required]; #16 (167) [intent may be proved from circumstances];

(Continued on following page)

Construction of the statutes and regulations so as to determine with precision what was required for conviction on a particular count was a matter of law for the court to decide. There was no harmful error in not cluttering the record unnecessarily with additional voluminous and complex exhibits, which might indeed have distracted and unduly burdened or confused the jury.

Appellant also argues that the statutes and regulations are unconstitutionally vague. It is true that Congress enumerated various policies requiring conflicting factors to be weighed. Twenty points[13] are specified in sections 2 and 3 of the Export Administration Act of 1979.

Thus Congress declares that exports contribute to national well-being, but some exports might be detrimental to national security by contributing to the military potential of unfriendly countries. Hence export controls should be imposed to restrict such exports, but only to the extent necessary, or to prevent drain of scarce materials, or to discourage restrictions imposed by foreign countries, or to encourage other countries to act against terrorism. There may be ambiguities and vagueness in these policy objectives, but the task of weighing and balancing the conflicting factors is committed by Congress to Executive discretion. As explained clearly by Judge Zobel in *U.S. v. Moller-Butcher*, 560 F. Supp. 550, 552-553 (D. Mass.

Footnote continued—

#18 (167) [defines "unlawfully"]; #19 (168) [defines "knowingly"]; #39 (183-84) [element of offense charged in Count VII is knowledge that such item would be used for the benefit of a country "to which exports are controlled for foreign policy purposes"]; #41 (186) [section 1485 A of Commodity Control List includes "inertial equipment", 15 CFR p. 511].

13. 93 Stat. 503-505. Codified with amendments in 50 U.S.C. app. 2401-2402, twenty-four points are listed.

1983), Congress enumerated the factors which are to guide the discretion of the executive department, but "also clearly expressed its desire that the executive branch, not the courts, have the final word on which items should be restricted."

The policy factors specified by Congress are not elements of the criminal offense of unlawful export. When the case gets to court, all that the Government needs to prove is that the item exported appears on the Munitions List or the Commodity Control List, as the case may be (and, of course, that the defendant knowingly and willfully exported it, with the necessary intent and knowledge, and without an appropriate license).[14] There is no unconstitutional vagueness. It is as simple a matter as forbidding a passenger to ride on a train without a valid ticket.

As to Counts I, II, IV, appellant argues that export of the items covered by those counts was lawful under the "normal commercial use" exception in Category XII (c) of the Munitions List (22 CFR part 121). The asterisk indicates that the article is deemed to be "significant military equipment" for which "special export controls are warranted because of their capacity for substantial military utility or capability." 22 CFR 120.19(a) and 121.1(b). That category covers the following:

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14. The trial court's charge #30 (176) plainly directed acquittal if the jury was not satisfied beyond a reasonable doubt that the defendant knew that the items exported were on the Munitions List and required license. See #42 (187-88) for Count VII [Commodity Control List, 15 CFR part 399, and 370.3 (a) and 387.3(a)].

CATEGORY XII-FIRE CONTROL, RANGE FINDER, OPTICAL AND GUIDANCE AND CONTROL EQUIPMENT

*(a) Fire control systems; gun and missile tracking and guidance systems: [*sic*] military infrared, image intensifier and other night sighting and night viewing equipment; military masers and military lasers; gun laying equipment; range, position and height finders and spotting instruments; aiming devices (electronic, gyroscopic, optic, and acoustic); bomb sights, bombing computers, military television sighting and viewing units, inertial platforms, and periscopes for the articles of this section.

*(b) Inertial and other weapons or space vehicle guidance and control systems; spacecraft guidance, control and stabilization systems; astro compasses; and star trackers.

(c) Components, parts, accessories, attachments, and associated equipment specifically designed or modified for the articles in paragraphs (a) and (b) of this category, *except for such items as are in normal commercial use.* [Italics supplied][15]

Appellant contends that the items covered by Counts I, II, and IV were legitimated as items "in normal commercial use" or at least he could reasonably have thought so at the time of exportation.

This argument is unpersuasive. It will be noted that subparagraphs (a) and (b) carry the asterisk, meaning

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15. It will be noted that 22 CFR 121.1, Category XII(a) includes "night viewing equipment" covered in Count I of the Indictment. Counts II and IV cover "electronic equipment . . . for military application" listed in Category XI of the Munitions List. Count III (TOW missile) is a Category IV item.

that the items listed therein are deemed to be "significant military equipment."

Subsection (c) clearly refers only to components, parts, accessories, attachments, and associated equipment designed or modified for use incidental to items in (a) or (b). Even though not deemed sufficiently significant to call for an asterisk, they are nonetheless considered as military items and subject to the export license requirement, unless they "are in normal commercial use." The exemption from a State Department license is limited, therfore, to *components* (not the principal device of which they form a part), and to components which are in *normal commercial use.* The "plain language" of the exception is so clear that any exporter claiming that the exception is applicable to the principal items covered by (a) or (b) does so at his peril.

Appellant likewise argues that it was error to exclude the opinion of a defense witness, James Rosenlieb, that the TACAN (tactical air navigation system) included in Count IV was not listed on the Munitions List (Tr., VIII, 192).

In explaining the reason for his opinion, the witness stated that if the equipment is used for its original purpose (air-to-air refueling) "there would probably be little doubt that it would be a . . . State Department controlled item" (Tr., VIII, 195).[16] He went on to say that to the extent that the system is used "for ground application of

16. Rebecca Shoemaker, of Rockwell International, the manufacturer of the equipment, describes its function, and knew of no non-military use for it. The device gives bearing and distance by means of air-to-air transmission without need for a ground station. Tr. IV, 57-58. Bert I. Smith testified similarly that the use of the device is for refueling [Tr., IV, 159-60] and that Gregg asked him to alter documents by eliminating reference to air-to-air use [Tr., IV, 164].

non-tactical, non-military nature" it would fall within the province of the Commerce Department. Inter-agency review would lead to allocation "depending on the end use" (Tr., VIII, 196).[17]

It seems clear that exclusion of this testimony was not harmful error. As set forth previously with regard to the policy issues referred to in *Moller-Butcher*, it is a matter of executive discretion to allow certain reliable consignees under Commerce Department authority to handle devices for non-military end-use. The testimony excluded would not have established any legitimate defense under the circumstances of the case at bar.

Appellant also contends that it was error to permit a demonstration to the jury of the manner in which a Tube Launched, Optically Tracked, Wire Command Missile System (T.O.W.) could be assembled from the components charged in Count III to have been exported by appellant, by combining with those components a launch tube and simulated warhead which appellant did not sell or export.

The thrust of this argument is similar to the objection often made in criminal cases that bullet holes in bloody clothing, or firearms and the like, are "inflammatory" and inadmissible. However, the contention is unconvincing where, as here, the demonstration and physical evidence are not pure "grandstanding" or dramatic sideshows, but logical explanations elucidating the nature and importance of the components which Gregg *did* export, and demonstrating their capability as part of what might be called

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17. See also Tr., I, 68 (ordinarily Commerce would yield to State).

a "going concern." One might quip that this is "synergistic" if not "syllogistic" proof.[18]

With respect to Count VII regarding attempted exportation of a "Laser Nav", appellant argues that there was not sufficient evidence to prove every element of the offense. As discussed previously, the statute requires, and the trial court's charge explicitly stated, that to convict under Count VII the jury must be satisfied beyond a reasonable doubt that, *inter alia*, appellant acted "with knowledge that the exports [would] be used for the benefit of, or that the destination or intended destination of the goods or technology involved [was] . . . any country to which exports are controlled for foreign policy purposes."

What evidence does the record contain that appellant Gregg had such knowledge? The Government's brief (pp. 35-36) is not helpful in pointing to any.[19]

It would not be necessary to scrutinize the entire record (although we have done so) in order to conclude that there is plainly sufficient circumstantial evidence

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18. The demonstration at least convincingly negated the "normal commercial use" argument. Appellant's brief (p. 30) does not press that argument in connection with Count III (citing Tr. VII, 14, which does not appear relevant to that point).

19. The Government apparently regarded this issue as identical with that regarding vagueness, and as having been decided by *Moller-Butcher*. The Government seems to believe that the trial court should not have included knowledge of destination subject to export control as an element of the offense, and argues that since the instruction was in fact given there was no harm to appellant. The Government's position is unsound. The statutory language is specific in requiring such knowledge as an element of the offense. A verdict of guilty under a proper instruction requiring proof of a certain element of the offense does not supply or create, as if by automatic parthenogenesis, the necessary evidence to prove that element of the offense. Such evidence must be contained in the record.

from which the jury might infer that Gregg knew that the destination of the Laser Nav was Japan, a country exports to which required a license.[20]

It will be remembered that the Laser Nav was the item part of which was found in Gregg's hand-carried luggage at the Los Angeles airport when he was about to board Singapore Airlines flight 11 for the Tokyo international airport. Tr., V, 76.[21] The other portion of the Laser Nav had been checked through to Tokyo, Tr. I, 148-51. The fact that Gregg had two sets of paperwork in his possession for the shipment, stating different values is also indicative of devious guilty knowledge. Tr., I, 151; V, 64-65; VII, 74-77. This inference is corroborated by the fact that Gregg concocted a fictitious "lease" in an effort to get back the seized equipment.[22] Tr., V, 34-35, 42, 62-65, 77, 93, 107; VI, 200; VII, 89. It is likewise significant that Honeywell jealously guards the Laser Nav against

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20. Appellant's brief (pp. 40-41) acknowledges that exports to Japan "are restricted for foreign policy purposes," but goes on to argue that the Japanese are the "good guys" and that the articles involved would not jeopardize American national security (and should be stricken from the list because available from other sources). This contention (unlike the Government's argument as to the need for evidence of knowledge of destination) does run afoul of the *Moller-Butcher* principle.

21. A travel agent testified regarding booking Gregg's itinerary from Los Angeles to Tokyo and beyond, and return. Tr. IV, 153-54.

22. Gregg had a general GTE license (General Temporary Export) which he contended would permit temporary export of the Laser Nav for a one year period. Tr., I, 63; V, 83-85. However, Gregg planned to leave for Japan on January 14, 1984. According to Terence Haglund, export manager for Honeywell, it was not until December 21, 1984, that a GTE license was first allowed to be used for temporary export of an inertial navigation system. Tr., IV, 192-93. Robert F. Tine, of the Customs Service, who stopped Gregg as he was getting on the airplane for Tokyo, testified that neither of the two sets of paperwork and licenses Gregg had in his possession would authorize export of the Laser Nav. Tr., V, 65, 106-107.

the possibility of "reverse engineering" and that Gregg resorted to subterfuge in procuring the device. Honeywell's sales agent was informed that it was to be used in an airplane owned by Jetex. Tr., IV, 176-81, 183-86; 207.

The contention that there was insufficient evidence to support a verdict of guilty cannot be accepted.

With respect to Counts VIII and IX, appellant urges that materiality was not adequately established. Appellant argues that undervaluation of the items being exported was a negligible or venial violation, since it was not an element in computing a tax or charge, to the pecuniary detriment of the Government.[23] However, the existence *vel non* of such a pecuniary loss to the Government is not the criterion for determining materiality. As pointed out in *U.S. v. Adler*, 623 F. 2d 1287, 1291-92 (8th Cir. 1980), a false document is material if it has a natural tendency to influence, or is capable of influencing, the official decision to evoke which defendant tenders it. That case also makes plain that in this Circuit the question of materiality is one of law. (623 F.2d at 1292).

Obviously the gross undervaluation in the case at bar was a stratagem designed to facilitate appellant's scheme to get the items out of the country. The record shows that the customs officials, in the press of business, are often guided by the declared values as indicia of the nature of the items being exported.[24] To use the quip

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23. It is of course true, as appellant stresses, that the valuation data form the basis of statistical compilations. Appellant's brief, p. 46; Tr., V, 150, 152.

24. See testimony of Daniel O. Hill, of the Commerce Department, Tr. I, 51-53, 58; of Paul Tundo, Customs Inspector, Tr., V, 54-55; of Mark Eisenhauer, Customs Inspector, Tr. V, 119; of Harold Blyweiss, of the Commerce Department, Tr., V, 157.

of a recent ex-President, it is important whether they are dealing with "a Ford, not a Lincoln." The high value of an item may well indicate that it is sophisticated equipment, important for export control scrutiny by reason of its capability for military utilization.

Appellant seeks solace in Judge McMillian's footnote 8 (623 F.2d at 1292), in which Judges Bright and Ross did not join, that in his view "the better practice is to submit the materiality issue *in this kind of fraud case* to the Jury." The kind of fraud case involved in *Adler* was collecting from Medicare for services not actually performed by a physician. The issue was not so much the value of the services, but whether they had ever been furnished by the doctor. The circumstances relative to that type of determination might often present some questions of fact appropriate for resolution by a jury.

But the case at bar is not an example of "this kind of fraud case", for purposes of Judge McMillian's note. The *quantum* is the significant feature of the valuation for export control purposes. It is the figure which "lets the case out of the bag" and tips off the customs officials to be alert in their scrutiny of the transaction.

Appellant's fictitious valuation certainly constitutes a "trick, scheme, or device" which "conceals or covers up" a material fact with respect to the nature of the articles being exported. In count VIII the discrepancy was between a declared value of $70,739.00 and a true value of $678,188.80; in Count IX the difference was between a declared value of $116,616.00 and a true value of $1,226,160.00.

It would be extremely difficult to regard this falsification as *de minimis*.

Finally, appellant contends that there was error in receiving incoming telex communications without producing the author thereof for confrontation and cross-examination.

There are several grounds warranting the admission of these documents. In the first place, to the extent relevant, they are clearly admissible as business records under Rule 803(b) of the Federal Rules of Evidence (FRE).

The status of the telexes as records "kept in the course of a regularly conducted business activity" is not affected by the fact that particular telex printouts were obtained by the prosecution by search of trash cans, or by interception pursuant to court order, or by search pursuant to a search warrant.

In the second place, insofar as the particular telexes under attack may have been admitted provisionally, subject to later connection, as statements of a co-conspirator during the existence of a conspiracy and in furtherance thereof,[25] under Eighth Circuit law such evidence requires proof by independent evidence *aliunde* of the existence of the conspiracy and of the connection of the defendant and the declarant with it. *U.S. v. Bell,* 573 F.2d 1040, 1043-44 (8th Cir. 1978); *U.S. v. Macklin,* 573 F.2d 1046, 1048 (8th Cir. 1978); *U.S. v. Massa,* 740 F.2d 629, 637-38 (8th Cir. 1984). *Bell* sets forth (573 F. 2d at 1044) a procedure outside the hearing of the jury for an "explicit determination" regarding the admissibility of the statement. In the case at bar the *Bell* procedure was duly followed. Tr., IX, 175-76.

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25. Rule 801(d)(2)(E) FRE.

And finally, whether or not particular incoming telexes are treated as statements by coconspirators, we are satisfied that they are admissible as being merely integral portions of a reciprocal communication process in order to interpret and explain in a precise and intelligible fashion the meaning and significance of appellant's own statements or actions,[26] which are clearly admissible against him[27] as against his self-interest.

From the foregoing review of appellant Werner Gregg's assignments of error at trial, we are convinced that none of them require reversal. Hence, with respect to both appellants, the judgment of the District Court is

AFFIRMED.

A True Copy.
Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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26. For example, an incoming telex from a purchaser requesting hand-delivery of certain items might explain Gregg's actions at the airport if he were complying with such a request. Thus, the telex of December 23, 1983, to Gregg from Mr. Harrah of Kaigai-Bussan in Japan states: "Regarding Hughes products. We request you to carry items which will be delivered to you until the date you are leaving from Kansas [City] to Tokyo." Gregg replied the same day, "Please be advised that we received payment today 12-23-83. Will hand carry items per your request. Regards, Werner." Tr., VI, 66-67, 71-72. The incoming telex would serve to explain both Gregg's answer and his actions.

27. See Rule 801(d)(2)(A) FRE.

(Filed February 15, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 85-0039-01/02-CR-W-8

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WERNER ERNST GREGG and ROSWITHA L. GREGG,
Defendants.

ORDER

Defendants are married and are the proprietors of Gregg International, an export/import business in Raytown, Missouri. They are charged with violations of various customs statutes and Internal Revenue Code provisions. Defendants jointly seek to suppress evidence obtained by: (1) "trash searches" of defendants' business and residence, (2) court-authorized interceptions of telex communications, (3) checkpoint seizures by customs agents, (4) statements of defendant Werner Gregg taken pursuant to a customs search and detention, (5) searches of defendants' business and residence pursuant to search warrants, and (6) statements of defendant Roswitha Gregg. On June 3-6, 1985, the court held an evidentiary hearing, and shortly after the hearing the court published written notice of its intention to deny defendants' joint

suppression motion in all respects, with a written opinion to follow. The following is a written memorandum of the court's decision.

Trash Searches

In February, 1984, United States Customs agents reached an agreement with representatives of a trash collection company for the company to give the agents any trash collected from defendants' residence and place of business. Evidence seized from the trash was used in support of the affidavits submitted for court-authorized seizure of defendants' telex communications. Subsequent searches of the Greggs' residence and business, customs searches, and statements taken from the defendants all resulted from the initial trash and telex searches. Defendants allege that beginning with the trash searches, all evidence seized from defendants was seized illegally, and each subsequent seizure resulted from precedent illegal seizures. Therefore, defendants contend, all evidence seized from defendants and any evidence derived therefrom must be suppressed.

The following facts regarding the trash searches were revealed at the evidentiary hearing in this matter. Defendants made arrangements for a private trash hauling company to pick up trash at defendants' residence and place of business[1] on a regular schedule. In February, 1984, Agent Ronald Garrison of the United States Customs Service informally approached a truck driver for the private company and reached an agreement whereby the

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1. Defendants' residence and business are both located in Raytown, Missouri. Defendants used the services of two private hauling companies during the relevant time period; customs agents reached the same agreement with both companies to obtain defendants' trash.

driver would turn defendants' business and residence trash over to customs agents for $20.00 each time the trash was collected. The agents first would verify that defendants had placed trash out for collection. A customs agent would meet the trash hauler and give him bags for the defendants' residence or business trash, the trash hauler would pick up defendants' trash, place it in the agent's bags, and then turn the trash over to the agent at a point near defendants' business or residence.

The trash at defendants' residence normally was left for collection in a plastic bag within a plastic receptacle left at the curbside of defendants' residence. The trash at defendants' business normally was left for collection in a plastic bag within a plastic receptacle located outside and adjacent to the back door of the business, approximately twenty-five to thirty-five feet from the street. The customs agents did not at any time contact the owners of the private trash companies; they relied on an informal agreement with the trash haulers. No search warrant was ever obtained for a trash search. Agents seized and searched defendants' residence and business trash on a regular basis from February 7, 1984 until September 11, 1984.

The court finds that defendants did not have a legitimate expectation of privacy in the trash picked up from their residence and business, and there was no fourth amendment violation in the seizure and search of their trash. In *United States v. Michaels*, 726 F.2d 1307 (8th Cir.), *cert. denied*, 105 S. Ct. 92 (1984), the court of appeals stated:

> Those circuits that have considered the issue of whether a person has a legitimate expectation of privacy in trash placed for collection in a public area,

> in close proximity to a public way, or in an outdoors communal trash container serving an apartment building, have consistently denied fourth amendment relief.

Id. at 1312 (citations omitted).

Furthermore, in *United States v. Biondich,* 652 F.2d 743 (8th Cir.), *cert. denied,* 454 U.S. 975 (1984), the court of appeals held:

> A person ordinarily retains some expectation of privacy in items that remain on his or her property, regardless of whether they are placed in an automobile, a home, or a garbage can. When a person makes arrangements with a sanitation service to have the items picked up, however, and when the items are placed in the designated place for collection and the regular collector makes the pickup in the usual manner on the scheduled collection day, the person loses his or her legitimate expectation of privacy in the items at the time they are taken off his or her premises.

Id. at 745.

The instant facts fall squarely within the *Biondich* rationale. Defendants made arrangements for a private company to pick up their business and residence trash in a regularly designated place at a regularly scheduled time. Evidence produced at the evidentiary hearing showed that the trash haulers picked up defendants' trash on a regular schedule, transported it away from defendants' business or residence, and the customs agents then received the trash at a point removed from defendants' property. Defendants lost any legitimate expectation of privacy in the trash at the time it was removed from their residence or business premises.

Defendants also argue that their freedom of thought and right of privacy was violated by the trash searches. In brief, defendants argue that they have a right to have their private, unexpressed written "thoughts" protected from public observation. As stated previously, defendants lost any constitutional expectation of privacy in their seized trash items when the items were removed from the business or residence premises. Defendants motion to suppress items seized in the trash searches of their business and residence is denied.

Telex Searches

In the trash pickups, customs agents found telexes transmitted between Gregg International and its customers. Telex is defined as "a communication system consisting of teletypewriters connected to a telephone network to send and receive signals." *The American Heritage Dictionary of the English Language,* 1324 (1981). George Byram, a former employee of Gregg International, told Customs Agent Garrison in an interview that the business primarily communicated with its overseas business customers by telex. Garrison stated at the evidentiary hearing that a review of the telexes found in the trash indicated that they related to business of Gregg International and not personal matters of the Greggs.

On March 19, 1984, the government applied for authorization to intercept the telex communications of Gregg International. March 19, 1984, Magistrate Calvin Hamilton authorized the telex interception for a thirty-day period, and the authorization was extended for additional thirty-day periods on April 30, 1984, May 24, 1984, and June 28, 1984. Customs agents obtained space in a building across the street from Gregg International and installed a printer

which would print out all telex communications of Gregg International. The phone company installed an access line from the Greggs' communication line to the government printer. The printer gave agents two copies of each telex communication; Agent Garrison would seal one copy and work with the other copy. On June 10, 1984, the government moved their copier to the offices of RCA Global Communications in Overland Park, Kansas. RCA Global was the international communications link for the Greggs' telex messages. The printer remained at RCA Global until the interceptions ceased on June 30, 1984. The agents did not monitor the printer constantly, but checked the printer on a regular basis for any transmissions.

Defendants challenge the legality of the telex interceptions on several bases. First, defendants argue that the telex interceptions should have complied with the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* The government argues that Title III does not apply to telex interceptions, and the government contends it properly sought authorization for the telex interceptions pursuant to Fed. R. Crim. P. 41(b).

The applicability of Title III to interception of telex communications appears to be a question of first impression. Title III regulates the "interception of wire or oral communications." 18 U.S.C. §§ 2516(1), 2518(1). "Intercept" is defined as the *aural acquisition* of the *contents* of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4) (emphasis added). Title III does not define "aural acquisition," but it has been stated that "an 'aural acquisition' by definition engages the sense of hearing."

Application of the United States for an Order Authorizing Installation & Use of a Pen Register, 546 F.2d 243, 245 (8th Cir. 1976), *cert. denied*, 434 U.S. 1008 (1978), *citing United States v. Falcone*, 505 F.2d 478, 482 (3rd Cir. 1974), *cert. denied*, 420 U.S. 955 (1975). "Contents" are defined to include "any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8).

The applicability of Title III to the instant telex interceptions hinges on whether the interceptions involved the "aural acquisition" of the telex messages, since the "contents" of these wire communications clearly were obtained. "[T]he legislative history indicates neither what Congress meant by 'aural' nor why the word was written into the statute." *United States v. Seidlitz*, 589 F.2d 152, 157 n.4 (4th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979).[2] In the absence of specific legislative guidance, the court must look to the most analogous communications interceptions and compare them with the method of telex interception.

In *United States v. New York Telephone Co.*, 434 U.S. 159 (1977), the Supreme Court held that Title III does not apply to telephone pen registers because the registers only decode electrical phone line impulses; the registers "do not hear sound" and therefore "do not accomplish the 'aural acquisition' of anything." *Id.* at 167. More importantly, the court further stated that the pen

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2. *Contra Hoosier Home Theater, Inc. v. Adkins*, 595 F. Supp. 389, 395-96 (S.D. Ind. 1984) (The legislative history establishes that the intent of Title III "was to proscribe eavesdropping on 'oral conversations (otherwise) made in *private*, without the consent of any of the *parties* to such communications.'") (emphasis in original).

registers "present the information in a form to be interpreted by sight rather than hearing." *Id.*

In *United States v. Seidlitz, supra,* the United States Court of Appeals for the Fourth Circuit considered the applicability of Title III to interception of communication between two computer systems via telephone lines. In rejecting the applicability of Title III, the court stated:

> We find no merit in the defendant's suggestion that, in the absence of either a statutory definition of the word "aural" or of legislative history to indicate that Congress even considered the relationship of Title III to computer systems, we should ignore the plain meaning of the term "aural" and should hold that, regardless of whether a device detects sound, its ability to interpret the substance of a transmission brings it within the restrictions of the statute. Canons of statutory construction require that we attribute to legislatively undefined words their commonly accepted meaning and that we give effect to what must be presumed to have been the purposeful inclusion in the legislation of a qualifying term such as "aural" which restricts the statute's scope.

589 F.2d at 157 (footnotes omitted).

In *United States v. Torres,* 751 F.2d 875 (7th Cir. 1984), *cert denied,* 105 S. Ct 1853 (1985), the court of appeals considered the applicability of Title III to television surveillance which involved visual transmissions without any audio interception. The court observed that "secretly televising people . . . while they are in what they think is a private place is an even greater intrusion on privacy than secretly recording their conversations." *Id.* at 878. Nevertheless, the court found Title III inap-

plicable and stated that "a visual observation is in no possible sense an 'aural acquisition.'" *Id.* at 880.

The court finds that the telex interceptions did not involve the "aural acquisition" of defendants' communications; therefore, Title III is inapplicable to the interceptions. The interceptions at issue did involve acquisition of the telex analog "sounds" that were transmitted by wire; however, this interception simply is not the type of "aural acquisition" within the purview of Title III. If Congress had intended for Title III to encompass all communications in which the contents of the communications were intercepted, it would have said so. However, the court believes the term "aural acquisition" was added to limit Title III specifically to those interceptions that were "overheard," *i.e.*, involve the sense of actually hearing the conversation. If Congress views telex interceptions and other similar interceptions as posing the same privacy invasions as wiretaps, it should expressly bring them within the purview of Title III; the court will not do so through unsupported statutory construction. The printed telex messages intercepted by the government do not fall within the purview of Title III.[3]

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3. The court agrees with Judge Posner's observation in *United States v. Torres* that it is anomalous to have detailed statutory regulation of bugging and wiretapping but not of other intrusive interceptions such as video surveillance and the telex interceptions at issue. *See* 751 F.2d at 885. Nevertheless, the court concurs with Judge Posner's conclusion that

> [w]hen Congress has indicated the domain of a statute as clearly as it did when it enacted Title III, we cannot apply the statute outside its domain merely because we are confident that if Congress had known then what we know now it would have used more general language. Congress said in language that could not be clearer that Title III is about the interception of wire and oral *communications* and that interception means *aural* acquisition.

Id. at 886 (emphasis in original).

Defendants further argue that the telex interceptions violated 47 U.S.C. § 605.[4] The court finds, however, that section 605 is inapplicable in the present case. The statute is expressly limited to radio communications. Though some of defendants' telex communications were transmitted in part by satellite or microwave links, they are

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4. Section 605 provides:

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received an intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

still considered wire communications by statute[5] and not radio communications, thus section 605 is inapplicable. *See United States v. Clegg,* 509 F.2d 605, 611-12 (5th Cir. 1975).

Defendants further argue that the telex interceptions violated the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 *et seq.*[6] The government has not sug-

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5. 18 U.S.C. § 2510(1).

6. Section 1801 provides the following definitions:

(a) 'Foreign power' means—

(1) a foreign government or any component thereof, whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign-based political organization, not substantially composed of United States persons; or

(6) an entity that is directed and controlled by a foreign government or governments.

(b) 'Agent of a foreign power' means—

(1) any person other than a United States person, who—

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;

(B) acts for or on behalf of a foreign power which engaged in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or

(Continued on following page)

gested at any time, however, that defendants have acted as agents of a foreign power as defined in section 1801; furthermore, defendants have not shown that they come within the definition or that the government has attempted to bring them within this act. Therefore, the Foreign Intelligence Surveillance Act is inapplicable.

Finally, defendants argue that the telex interceptions did not meet the requirements of the fourth amendment or Fed. R. Crim. P. 41. In particular, defendants assert that electronic surveillance may not be authorized pursuant to Rule 41, that "intangible" property such as telex communications is not within the scope of Rule 41, that the telex warrants did not comply with the provisions of Rule 41(c), and that the warrants did not meet the probable cause requirements of the fourth amendment.

The court finds that the Magistrate properly authorized the telex interceptions pursuant to Rule 41(b). The rule authorizes the issuance of a warrant to:

Footnote continued—

> (2) any person who—
>
> (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;
>
> (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;
>
> (C) knowingly engaged in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power; or
>
> (D) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

Rule 57(b), before its amendment in 1985, provided:

If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

The search authorization provided in these rules is undoubtedly broad enough to encompass the telex interceptions at issue. *Cf. United States v. New York Telephone Co.*, 434 U.S. at 168-170 (Rule 41 is sufficiently flexible to include electronic intrusions authorized upon a finding of probable cause; *citing Katz v. United States*, 389 U.S. 347, 354-56 (1967)). The court finds that the warrants were properly issued pursuant to Rule 41(b) and complied in all respects with the requirements of Rule 41(c).

The court further finds that probable cause existed for the telex warrants to issue based on the supporting affidavits, and that the warrants meet the particularity requirements of the fourth amendment. Defendants failed to show at the evidentiary hearing that the supporting affidavits of Customs Agent Garrison contained deliberate falsehoods or reckless misstatements; the affidavits clearly provided probable cause for authorization of the telex searches. Furthermore, the affidavits were sufficiently particular to pass constitutioal scrutiny. Defendants' most

cogent argument regarding particularity is their assertion that the warrants' authorization of interception of *all* of defendants' business communications is improper, and that the intercepted communications should have been minimized as required for interceptions authorized under Title III. Defendants attempted to show at the evidentiary hearing that the telex machine could have been "programmed" to intercept only certain desired messages regarding designated business customers, thereby minimizing the required interceptions. The government argues that Gregg International was a business "permeated" with criminal activity, thus interception of all business-related telexes was proper.

While the telex warrants were indiscriminate in the respect that all communications were seized, the court does not believe that such a comprehensive seizure constitutes a *per se* fourth amendment violation. It can be conceded that the telex search at issue was less discriminating than a standard physical search; however, the telex search is more discriminating than bugs or wiretaps which intercept all conversations, be they business or private. Evidence produced at the evidentiary hearing showed that the telex machine was used almost exclusively for business purposes and that probable cause existed to believe that the defendants' business was permeated with criminal activity. Given these circumstances, seizure of all telex communications by Gregg International is not so random or indiscriminate as to constitute a fourth amendment violation. Defendants' argument fails.

Customs Searches

Defendants challenge three separate warrantless seizures by customs agents of items belonging to defendants.[7] The searches plainly were border searches which are not subject to the warrant provisions of the fourth amendment and are reasonagle within the terms of the amendment. *See United States v. Ramsey*, 431 U.S. 606, 616-18 (1977). Defendants' cited authorities are distinguishable on the facts and law, and no further discussion is required.

Statements of Werner Gregg

Defendants seek to suppress three statements taken by customs agents from defendant Werner Gregg. The first statement was taken by Special Agent Robert Tine on June 25, 1984, at the Los Angeles, California, airport. Evidence produced at the evidentiary hearing regarding this statement established that Agent Garrison in Kansas City contacted Agent Tine in Los Angeles and informed Tine that Gregg would be leaving for Tokyo, Japan, on a designated flight with unlicensed electronic equipment in his carry-on luggage. Agent Tine and other agents detained Gregg at the jetway entrance to the Tokyo flight. Agent Tine identified himself, asked Mr. Gregg if he would agree to make a statement, and Mr. Gregg agreed. Gregg was taken to the customs office of the Los Angeles airport, where he gave a forty-five-minute statement to Agent Tine in the presence of other agents.

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7. On June 25, 1984, items were seized from Werner Gregg's luggage at the Los Angeles, California airport; on April 29, 1984, items were seized in packages at the Chicago, Illinois airport; on August 24, 1984, an item was seized from a package at the Los Angeles airport.

The second statement occurred on August 21, 1984, when Agents Garrison and Tine visited Werner Gregg at his business in Raytown, Missouri. Agent Tine indicated he wished to discuss the item seized at the Los Angeles airport and Gregg's petition to get the item back from the customs service. Gregg agreed to make a tape recorded statement in his office. The third statement at issue is an August 3, 1984, statement by Werner Gregg made in a phone conversation with an undercover customs agent in New York, New York. The focus of defendants' and the government's briefing and evidence has been on the first two statements.

Gregg was not placed under arrest at the time any of the statements were taken, nor was he given *Miranda* warnings at any time. Furthermore, Gregg was not informed that he was the subject of a customs investigation. Defendants allege that the statements at the Los Angeles airport were taken in a custodial setting and *Miranda* warnings should have been given. Defendants further argue that Gregg's statement at his Raytown business should be suppressed as "fruit of the poisonous tree"; *i.e.*, a result of the Los Angeles statement.

In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Supreme Court stated:

> [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an

> incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Id. at 300-02 (footnotes omitted).

The statement taken from Werner Gregg at the Los Angeles airport was given freely and openly, and from the "totality of the circumstances" it is clear that Gregg was free to leave at any time and was not subject to coercive tactics which he could have perceived as custodial interrogation. The statement given by Gregg at his Raytown office also was given voluntarily and without any circumstances which could be construed as custodial interrogation. Regarding the third statement, defendants have not made any showing that the statement made to an undercover agent was made in a custodial setting. The *Miranda* safeguards did not come into play in any of the circumstances at issue, and suppression of the statements is not required.

Search of Defendants' Business and Residence

On September 13, 1984, pursuant to search warrants, customs agents and other law enforcement officials seized business records, telexes, and other documents from defendants' business, and documents and an automobile from defendants' residence. Defendants argue that probable cause did not exist for the issuance of the warrants, that the warrants did not particularly describe the items to be seized, that the language of the warrants was overbroad, that unauthorized persons participated in the searches, and that the searches were "general searches" not authorized by the warrants.

Extensive evidence was introduced at the evidentiary hearing regarding the search warrants themselves, the persons who conducted the searches, the manner in which the searches were conducted, and the items that were seized. A review of the affidavits submitted by Customs Agent Garrison in support of the search warrant applications reveals no deliberately false statements or reckless misstatements which would invalidate the warrants. The affidavits and supporting materials provided probable cause for the Magistrate to issue the search warrants.

The warrants described with sufficient particularity the items to be seized. The language of a warrant must be sufficiently definite to allow the searcher reasonably to ascertain and identify the items to be seized. *Stede v. United States*, 267 U.S. 498, 503-04 (1925). The warrant's description of the documents to be seized from defendants' residence and business was sufficiently definite for the searching agents to determine the items to be

seized.[8] Furthermore, the language was not overbroad. The primary searchers were customs agents who were informed regarding the documents to be seized and had adequate training to enable them to identify the described documents.

The search was not a general search. Thousands of documents were seized, but the seizure was not overbroad given the large quantity of documents generated by the business and the suspected breadth of the business's criminal activity. The search was conducted in an orderly manner with the intrusion minimized by the agents to the greatest extent possible. In addition, there is no evidence that unauthorized individuals or any individuals who were not law enforcement officers participated in the searches. The searches for and seizures of documents were conducted by trained government agents who were assisted by Raytown, Missouri police officers in maintaining order and removing documents during the search. Defendants' motion to suppress items seized from defendants' residence and business is denied.

Statement of Roswitha Gregg

At the evidentiary hearing, defendants moved to suppress statements allegedly made by Roswitha Gregg during the search of the Greggs' business and residence. Cus-

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8. The warrant provided that the following items could be seized:

> documents that consist of sales, invoices, shipping papers, purchase orders, correspondence, payment records, and telexes relating to the purchase, sale, storage, transportation and financing of merchandise exported or to be exported from the United States in violation of the United States Export Administration Regulations, Parts 371, 372, 373, 386, 387 and Titles 22 USC 2778, 50 USC 1702, 50 USC 1705 and Presidential Executive Order 12470 of March 30, 1984.

toms Agent Thomas King testified that during the search of the Greggs' residence, and while inside the residence, Mrs. Gregg stated, "Why are you doing this when he is not here. Now they will think I made all the mistakes." King testified that Mrs. Gregg was not detained nor was she being interrogated when the statement was made, and he stated that Mrs. Gregg simply volunteered the statement without any prompting or response by the searchers. Customs Agent Curtis Fair testified that while Mrs. Gregg was at Gregg International during the initial stages of the business search, he overhead a statement made by Mrs. Gregg during a telephone conversation. Fair testified that Mrs. Gregg stated, "They are going to search the house. If they do they will find the old records that will hang him." Fair testified that Mrs. Gregg was not under interrogation when the statement was made, and no questions were asked of Mrs. Gregg by agents after the statement.

As with the statements of Werner Gregg, the court finds from the totality of the circumstances that the statements of Roswitha Gregg were not made during custodial interrogation. *Miranda* warnings were not given to Mrs. Gregg, and she may have felt a personal compulsion to remain at the business and residence during the searches; however, it is clear that the statements were volunteered by Mrs. Gregg when she was not under any compulsion to remain in the search area. Most importantly, law enforcement officials in no way engaged in actions designed to elicit statements from Mrs. Gregg; her statements did not result from interrogation as defined in *Rhode Island v. Innis*. Defendants' motion to suppress these statements is denied.

For the reasons stated, it is

ORDERED that defendants' joint motion to suppress evidence is denied.

/s/ Joseph E. Stevens, Jr.
Joseph E. Stevens, Jr.
United States District Judge

February 15th, 1986

(Dated October 30, 1987)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1572/1787/87-1622-WM

United States of America,
Appellee,

vs.

Werner Ernst Gregg, et al.,
Appellants.

Appeals from the United States District Court for the Western District of Missouri

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Appellants' petition for rehearing has been considered by the Court and is hereby denied.

October 30, 1987

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit

CONSTITUTIONAL PROVISIONS

United States Constitution Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnessses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 2518. Procedure for interception of wire, oral, or electronic communications.

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the

nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire, oral, or electronic communication under this chapter shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, cutodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance.

(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of

this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

* * *

22 U.S.C. § 2778. Control of arms exports and imports

(a) (1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.

(2) Decisions on issuing export licenses under this section shall be made in coordination with the Director of the United States Arms Control and Disarmament Agency and shall take into account the Director's opinion as to whether the export of an article will contribute to an arms race, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control arrangements.

(b) (1) As prescribed in regulations issued under this section, every person (other than an officer or employee of the United States Government acting in an official capacity) who engages in the business of manufacturing, exporting, or importing any defense articles or defense services designated by the President under subsection (a) (1) of this section shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations. Such regulations shall prohibit the return to the United States for sale in the

United States (other than for the Armed Forces of the United States and its allies or for any State or local law enforcement agency) of any military firearms or ammunition of United States manufacture furnished to foreign governments by the United States under this chapter or any other foreign assistance or sales program of the United States, whether or not enhanced in value or improved in condition of a foreign country. This prohibition shall not extend to similar firearms that have been so substantially transformed as to become, in effect, articles of foreign manufacture.

(2) Except as otherwise specifically provided in regulations issued under subsection (a)(1) of this section, no defense articles or defense services designated by the President under subsection (a)(1) of this section may be exported or imported without a license for such export or import, issued in accordance with this chapter and regulations issued under this chapter, except that no license shall be required for exports or imports made by or for an agency of the United States Government (A) for official use by a department or agency of the United States Government, or (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.

(3) No license may be issued under this chapter for the export of any major defense equipment sold under a contract in the amount of $25,000,000 or more to any foreign country which is not a member of the North Atlantic Treaty Organization unless such major defense equipment was sold under this chapter. The prohibition contained in the first sentence of this paragraph shall not apply to the issuance of licenses under this section for the export of major defense equipment to Australia, Japan, or New Zealand, or major defense equipment sold commercially in

implementation of an agreement between the United States Government and the government of a foreign country for the production of the major defense equipment to which such licenses relate if the President has submitted a certificate with respect to such proposed agreement, prior to its signature, to the Speaker of the House of Representatives and to the chairman of the Committee on Foreign Relations of the Senate in the same form as the certification required under section 2776 (b) of this title and subject to the requirements of such section.

(c) Any person who willfully violates any provision of this section or section 2779 of this title, or any rule or regulation issued under either section, or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $100,000 or imprisoned not more than two years, or both.

(d) This section applies to and within the Canal Zone.

(e) In carrying out functions under this section with respect to the export of defense articles and defense services, the President is authorized to exercise the same powers concerning violations and enforcement which are conferred upon departments, agencies and officials by sections 6(c), (d), (e), and (f) and 7(a) and (c) of the Export Administration Act of 1969, subject to the same terms and conditions as are applicable to such powers under such Act. Nothing in this subsection shall be construed as authorizing the withholding of information from the Congress.

Pub.L. 90-629, Ch. 3, § 38, as added Pub.L. 94-329, Title II, § 212(a)(1), June 30, 1976, 90 Stat. 744, and amended Pub.L. 95-92, § 20, Aug. 4, 1977, 91 Stat. 623.

50 App. U.S.C. § 2410

VIOLATIONS

(a) IN GENERAL.—Except as provided in subsection (b) of this section, whoever knowingly violates any provision of this Act or any regulation, order, or license issued thereunder shall be fined not more than five times the value of the exports involved or $50,000, whichever is greater, or imprisoned not more than 5 years, or both.

(b) WILLFUL VIOLATIONS.—(1) Whoever willfully exports anything contrary to any provision of this Act or any regulation, order, or license issued thereunder, with knowledge that such exports will be used for the benefit of any country to which exports are restricted for national security or foreign policy purposes—(A) except in the case of an individual, shall be fined not more than five times the value of the exports involved or $1,000,000, whichever is greater; and (B) in the case of an individual, shall be fined not more than $250,000, or imprisoned not more than 10 years, or both.

(2) Any person who is issued a validated license under this Act for the export of any good or technology to a controlled country and who, with knowledge that such a good or technology is being used by such controlled country for military or intelligence gathering purposes contrary to the conditions under which the license was issued, willfully fails to report such use to the Secretary of Defense—(A) except in the case of an individual, shall be fined not more than five times the value of the exports involved or $1,000,000, whichever is greater;

and (B) in the case of an individual, shall be fined not more than $250,000, or imprisoned not more than 5 years or both. For purposes of this paragraph, "controlled country" means any country described in section 620(f) of the Foreign Assistance Act of 1961.

* * *

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No. 87-1156

In the Supreme Court of the United States

OCTOBER TERM, 1987

WERNER ERNST GREGG AND ROSWITHA L. GREGG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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18 pp

QUESTIONS PRESENTED

1. Whether a warrantless search of petitioners' trash violated their Fourth Amendment rights.

2. Whether the warrants authorizing the interception of telex transmissions to and from petitioners' business and the search of petitioners' home and business satisfied the particularity requirement of the Fourth Amendment.

3. Whether the district court properly barred petitioner Werner Gregg from introducing into evidence at his trial copies of the statutes and regulations under which he was convicted and expert testimony about the meaning of those statutes and regulations.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 829 F.2d 1430. The opinion of the district court denying petitioners' motion to suppress evidence (Pet. App. A22-A42) is reported at 629 F. Supp. 958.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1987. A petition for rehearing was denied on October 30, 1987 (Pet. App. A43). On December 21, 1987, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including January 8, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner Werner

Gregg was convicted on four counts of exporting items on the United States Munitions List without a license from the State Department, in violation of the Arms Export Control Act, 22 U.S.C. 2778 (Counts 1-4);[1] one count of exporting an item subject to the Export Administration Act of 1979 without a license from the Commerce Department, in violation of 50 U.S.C. App. 2410 (Count 7);[2] and two counts of making a false statement on a matter within the jurisdiction of an agency of the United States government, in violation of 18 U.S.C. 1001 (Counts 8 and 9).[3] Petitioner Roswitha Gregg entered a conditional plea of nolo contendere to two counts of income tax evasion, in violation of 26 U.S.C. 7206(1) (Counts 10 and 11). Werner Gregg was sentenced to an aggregate term of three years' imprisonment, followed by a five-year term of probation. He was also ordered to pay fines totaling $200,000. Roswitha Gregg was sentenced to three years' imprisonment with all but six months suspended, followed by a three-year term of probation. She was also ordered to pay fines totaling $4000. The court of appeals affirmed (Pet. App. A1-A2).

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[1] Count 1 charged petitioners with exporting night vision goggles usable for military purposes to the Republic of South Africa. Count 2 charged the unlawful export of 16 military aircraft communication radios to a private company in West Germany. Count 3 involved the sale of component parts of a TOW missile system. Count 4 alleged that petitioners had attempted to export a TACAN air-to-air guidance system. Pet. App. A2-A3 n.4.

[2] Count 7 charged an attempt to export a Laser Inertial Navigation System to Japan without a Commerce Department license (Pet. App. A3 n.4).

[3] Werner Gregg was acquitted of one count of exporting items on the United States Munitions List, one count charging a violation of the Export Administration Act, and four counts of income tax evasion (Pet. App. A2-A3 nn. 1, 4).

1. Petitioner Werner Gregg founded, and both petitioners operated, a company called Gregg International. In September 1982, the Federal Bureau of Investigation (FBI) received information from a former employee of Gregg International that Werner Gregg had exported a TOW missile system to the Republic of South Africa without the license required by federal law. The FBI passed that information on to agents of the United States Customs Service, which began an investigation of petitioners and their business.

In February 1984, a Customs Service agent arranged to pay a fee to employees of the company that collected trash from petitioners' home and business if the employees would turn the trash over to Customs agents. Under the terms of the arrangement, Customs agents would determine when petitioners had placed their trash out for collection. An agent then would meet the trash hauler and provide special bags for petitioners' trash. The trash collector would pick up petitioners' trash, place it in the special bags, and turn it over to the Customs agents at a point removed from petitioners' home or business. Pet. App. A23-A24.[4] The Customs agents did not obtain a warrant to search the trash (*id.* at A24).

In the trash, government agents found telex messages between Gregg International and its customers. Based on the telexes, Customs agents obtained a warrant authorizing the interception of all telex communications to and from Gregg International for a period of 30 days. That authorization was later extended for three additional

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[4] At both petitioners' residence and their business, the trash was placed in plastic bags, which in turn were placed in plastic receptacles. At petitioners' home the trash was left at the curb. At petitioners' business, the trash was left 25 to 35 feet from the street. (Pet. App. A24).

30-day periods. Pursuant to the telex warrants, the government monitored all telex traffic to and from Gregg International between March 19, 1984, and June 30, 1984. Pet. App. A26-A27.

Based in part on the information obtained from the telex interceptions and the search of petitioners' trash, Customs agents obtained a warrant authorizing the search of petitioners' residence and business for documents relating to violations of various federal export control laws and regulations. On September 13, 1984, Customs agents, assisted by local police officers, executed the warrant and seized business records, telexes, and other documents from petitioners' home and business premises. Pet. App. A39-A40.

2. Before trial, petitioners filed a joint motion to suppress the evidence against them, including the evidence obtained from their trash, from the interception of telexes, and from the September 13 search of their residence. The district court held an evidentiary hearing and denied the motion in full. The court held that petitioners had no reasonable expectation of privacy in their trash and that the warrantless trash search therefore did not violate the Fourth Amendment (Pet. App. A23-A26). The court also rejected petitioners' contentions that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 801, 82 Stat. 211, applied to government interception of telex messages (Pet. App. A26-A31), and that there was insufficient probable cause to seize all the telex messages to and from petitioners' business (*id.* at A33).[5] In upholding the warrant authorizing telex in-

[5] The district court also held that the telex interception did not violate 47 U.S.C. 605 and that the warrant authorizing the interception complied with Fed. R. Crim. P. 41 (Pet. App. A31-A34). Petitioners have not challenged those holdings in this Court.

terceptions, the district court specifically found that "probable cause existed to believe that [petitioners'] business was permeated with criminal activity" (*id.* at A35). Finally, the district court upheld the warrant authorizing the September 13 search of petitioners' home and business (*id.* at A39-A40).[6] Again, in upholding the warrant and search the court noted "the suspected breadth of the business's criminal activity," and it found that "[t]he search was conducted in an orderly manner with the intrusion minimized by the agents to the greatest extent possible" (*id.* at A40).

The district court granted Roswitha Gregg's motion to sever her trial from her husband's. At Werner Gregg's trial, the government introduced evidence to show that the items that petitioners exported or attempted to export were subject to the licensing requirements contained in 22 U.S.C. 2778 and 50 U.S.C. App. 2410. The government also introduced evidence showing that Werner Gregg had substantial expertise in the area of restricted, licensed exports. Pet. App. A10.

Gregg did not dispute that he had exported or attempted to export the items charged. Instead, he attempted to show that the items at issue were not subject to the State and Commerce Department licensing schemes that he was charged with violating. To that end, Gregg sought to introduce expert testimony that the items at issue were not in fact subject to those requirements. In addition, in an attempt to demonstrate that he lacked the specific intent required by the pertinent statutes, Gregg sought to introduce into evidence the federal statutes and regulations that

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[6] The court also rejected several other challenges to the government's evidence, including petitioners' claims that statements made by both petitioners were inadmissible and that Customs agents had improperly searched Werner Gregg's luggage as he was leaving the country (Pet. App. A36-A38, A40-A41).

create and define the licensing requirements and list the items that are subject to licensing. The district court refused to admit either the proffered testimony or the regulations. Pet. App. A10-A11.

Following Werner Gregg's conviction, Roswitha Gregg agreed to enter a conditional plea of nolo contendere to two counts of income tax evasion (Pet. App. A2 n.1). In return, the government agreed to dismiss the remaining counts against her, to make no recommendation as to sentence, and to urge the district court to allow Mrs. Gregg to remain free on bail pending appeal. In accordance with Fed. R. Crim. P. 11(a)(2), the agreement allowed Mrs. Gregg to appeal the denial of the motion to suppress.

3. The court of appeals affirmed petitioners' convictions (Pet. App. A1-A21). The court agreed with the district court that petitioners did not have a reasonable expectation of privacy in their trash and that Title III did not apply to telex transmissions (*id.* at A2-A5). In addition, the court of appeals rejected Werner Gregg's contention that the district court erred by refusing to allow Gregg's counsel to introduce into evidence the statutes and regulations defining the offenses charged in the indictment (*id.* at A10-A11). Finally, the court affirmed the district court's decision to disallow the expert testimony proffered by Gregg concerning the reach of the statutes (*id.* at A14-A15).[7]

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[7] The court of appeals also rejected Werner Gregg's contentions that the statutes at issue are unconstitutionally vague and that evidentiary rulings by the district court during his trial were erroneous (Pet. App. A11-A12). These claims are not renewed in this Court.

ARGUMENT

1. Petitioners contend that the warrantless search of their trash violated the Fourth Amendment (Pet. 22). The searches of petitioners' trash closely resemble the trash searches that are at issue in *California* v. *Greenwood,* No. 86-684 (argued Jan. 11, 1988). In both cases, a law enforcement officer informally asked a trash hauler to turn refuse collected at the defendant's curbside over to the officer. In both cases, information obtained in that manner was used to obtain warrants for other searches. See *People* v. *Greenwood,* 182 Cal. App. 3d 729, 732-733, 227 Cal. Rptr. 539, 542-543 (1986). The validity of the search of petitioners' trash is likely to depend on the resolution of *Greenwood.* This petition therefore should be held pending the decision in that case.

2. Petitioners contend that the the warrants authorizing the interception of the telex traffic, the search of their home and business, and the seizure of their business records were invalid. The rejection of this contention by the courts below, however, is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review of petitioners' Fourth Amendment claim is unwarranted.

a. First, petitioners maintain (Pet. 11-14) that the warrants authorizing the interception of the telex messages were insufficiently particularized. They argue that Title III embodies the standards to be applied to the issuance and execution of such warrants.[8] Thus, they claim that the

[8] Petitioners have abandoned their claim, rejected by both courts below, that the version of Title III that was applicable at the time of the interceptions in this case directly governed the interception of telex messages (see Pet. 12-14 & nn.11 & 13). In 1986, after the searches in this case, Title III was amended so that it now reaches telex communications. See Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101(a)(3), 100 Stat. 1848.

magistrate issuing the warrant was required to find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous" (18 U.S.C. 2518(3)(c)), that the agents executing the warrant should have made efforts to minimize the interception of legitimate telex messages (18 U.S.C. 2518(5)), and that the warrant must contain a "particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates" (18 U.S.C. 2518(4)(c)).

First, contrary to petitioners' assertion, the warrant substantially complied with the pertinent requirements of Title III. The warrant contained a description of the communications to be intercepted and the particular offenses to which those communications related. Second, there was nothing that government agents could do to lessen the interception of legitimate telex messages in the circumstances of this case. All of the telexes intercepted were to and from petitioners' business, Gregg International (Pet. App. A27). Thus, each had to be examined to determine if it related to criminal transactions, which the district court found to be a substantial part of petitioners' business (*id.* at A35). In addition, the warrant tracked the requirement of 18 U.S.C. 2518(5) by providing that the interceptions could not last more than 30 days unless the warrant was renewed (Pet. App. A26). There is therefore no merit to petitioners' assertion that the warrant was insufficiently particularized.

Petitioners contend, however, that the decision of the court of appeals conflicts with those of other courts of appeals, which have mandated strict compliance with the requirements of Title III in cases involving television surveillance, to which the former version of Title III also

did not expressly apply. Pet. 12-14 (citing *United States* v. *Torres*, 751 F.2d 875 (7th Cir. 1984), cert. denied, 470 U.S. 1087 (1985); *United States* v. *Biasucci*, 786 F.2d 504 (2d Cir. 1986), cert. denied, No. 85-2108 (Oct. 6, 1986); *United States* v. *Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987)). These cases are readily distinguishable. In each, the court relied on the extremely intrusive character of secret television surveillance to hold that Title III embodied the minimum requirements of the Fourth Amendment's particularity clause. These courts reasoned that television is significantly more intrusive than other forms of electronic surveillance because it indiscriminately records everything its subjects do.

By contrast, the interception of telex messages is much less intrusive than a telephone or other wiretap that would be subject to Title III. Telex messages are rarely used for personal as opposed to business communications, and their interception does not indiscriminately record everything a person does or says. Instead, the interception of telex transmission intrudes on only a narrow range of activity. For these reasons, the warrant issued in this case satisfies the particularity requirement of the Fourth Amendment, and the failure to comply with some aspect of Title III does not, ipso facto, constitute a violation of the Constitution.[9]

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[9] Petitioners also contend (Pet. 10-12) that the decision of the court of appeals upholding the interception of the telexes conflicts with this Court's decisions in *Osborn* v. *United States*, 385 U.S. 323 (1966); *Berger* v. *New York*, 388 U.S. 41 (1967); and *Katz* v. *United States*, 389 U.S. 347 (1967). There is no merit whatever to this contention; the claimed "conflict" is nothing more than a restatement of petitioners' claim that the warrant authorizing the interception was insufficiently particular.

b. Petitioners next contend (Pet. 14-18) that the warrants authorizing the interception of the telexes and the search of their home and business were overbroad in that they allowed the executing officers to seize all telexes to and from petitioners' business and thousands of documents from their home and business premises. For this reason, petitioners claim, the decision of the court of appeals upholding the warrants is contrary to *Marron* v. *United States,* 275 U.S. 192 (1927), and other decisions of this Court holding that the Constitution forbids "general warrants."

As explained above, the warrant authorizing interception of the telexes was not overbroad and did not result in an "overseizure." Because of the nature of telex technology and the fact that so much of petitioners' business was suspect, the Customs agents had to examine each telex to or from Gregg International in order to determine whether the telexes related to the illegal activity for which the agents had developed probable cause. It is well established that, as in this case, a warrant may describe a broad category of documents if a more precise description of the items to be seized is not possible. See *Williams* v. *Kunze,* 806 F.2d 594, 598 (5th Cir. 1986); *United States* v. *Gomez-Soto,* 723 F.2d 649, 654 (9th Cir.), cert. denied, 466 U.S. 977 (1984).

Nor was the warrant authorizing the search of petitioners' home and businesss and the seizure of documents found there overbroad. Contrary to petitioners' assertion, the warrant did not allow the seizure of " 'all' business documents of Gregg International" (Pet. 16). Rather, the warrant was limited to "documents that consist of sales, invoices, shipping papers, purchase orders, correspondence, payment records, and telexes relating to the purchase, sale, storage, transportation and financing of merchandise exported or to be exported from the United

States" in violation of several Export Administration Regulations, federal statutes, and an executive order (Pet. App. A40 n.8). That description adequately channeled the discretion of the officers executing the warrant and prevented the search from being overbroad. See *Andresen* v. *Maryland,* 427 U.S. 463, 480-482 (1976); *United States* v. *Sawyer,* 799 F.2d 1494, 1508 (11th Cir. 1986), cert. denied, No. 86-6012 (Jan. 27, 1987). A warrant does not have to specify the precise documents to be seized in order to satisfy the Fourth Amendment. See *United States* v. *Vanichromanee,* 742 F.2d 340, 347 (7th Cir. 1984).

The reason why the warrant in this case authorized such an extensive seizure was not that the warrant was overbroad; rather, it was that petitioners' illegal activities were extensive (see Pet. App. A35, A40). As this Court said in *Andresen,* 427 U.S. at 481 n.10, "[t]he complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession." The decision of the court of appeals upholding this warrant therefore does not conflict with this Court's decision in *Marron.*

c. Petitioners also raise two other related contentions concerning the breadth of the search of their business. First, they claim that the courts of appeals are divided over the question whether a finding that a business is "permeated with illegal activity" can justify an "overseizure beyond the scope of the warrant" (Pet. 18). Second, petitioners claim that the type of relief that should be granted for such "overseizures" is a question that should be addressed by this Court (Pet. 21).

The short answer to these contentions is that neither court below found that there has been any such "overseizure." Nor, as discussed above, is there any basis for

this Court to grant certiorari and determine (contrary to the holdings below) that any warrant in this case was "overly broad on its face" (Pet. 21). Thus, there is no reason in this case for this Court to address the consequences of overbroad searches or overbroad warrants.

3. Petitioner Werner Gregg contends that the district court erred by refusing to allow him to introduce into evidence the federal statutes and regulations under which he was convicted and by excluding the testimony of three expert witnesses who were to testify about the meaning of those statutes (Pet. 22-24). Neither contention is meritorious.

Petitioner argues that the length and complexity of the Arms Export Control Act, the Export Administration Act of 1979, and the regulations promulgated under both statutes are relevant to the question whether he had the specific intent to violate the law. He claims that he should have been allowed to put these statutes and regulations before the jury as evidence that he did not deliberately violate the law, presumably because the law in question was too complex to understand or master.

The district court instructed the jury that the government had to prove beyond a reasonable doubt that Werner Gregg "acted knowingly and willfully, and with specific intent, and particular knowledge" (Pet. App. A10). Petitioner did not challenge this instruction. Nor does petitioner claim that there was insufficient evidence to show that he had the requisite specific intent. Indeed, the evidence at trial showed that Werner Gregg possessed considerable expertise on the statutory scheme at issue (*ibid.*).

Moreover, it is ordinarily not the province of the jury to interpret the law, and statutes are not usually admitted into evidence. The introduction of legal material is likely to confuse the jury without shedding light on the factual issue it has to decide—in this instance, whether petitioner

specifically intended to export controlled items without the requisite licenses. For these reasons, the district court did not abuse its discretion by excluding the statutory material. See *United States* v. *Bernhardt,* 642 F.2d 251, 253 (8th Cir. 1981); *Cooley* v. *United States,* 501 F.2d 1249, 1253-1254 (9th Cir. 1974), cert. denied, 419 U.S. 1123 (1975).

The district court also did not abuse its discretion by refusing to admit testimony by three defense experts regarding the meaning of the statutes and regulations under which Werner Gregg was convicted. Two of the expert witnesses were to testify that the items that Gregg was charged with exporting in Counts 1, 2, and 4 fell into the "normal commercial use" exception of the United States Munitions List. See 22 C.F.R. 121.1, Category XII(c). The third witness was to testify about whether the TACAN air-to-air guidance system that was the subject of Count 4 was on the Munitions List. A secondary purpose of the testimony of all three witnesses apparently was to show that the question whether export of these items was proscribed was sufficiently unclear that Gregg could not have intended to violate the law.

The court of appeals found as a matter of law that the items that formed the basis for Counts 1, 2, and 4 were on the Munitions List and were not subject to the "normal commercial use" exception to Category XII of the list (Pet. App. A12-A14). In addition, the court held that the exclusion of testimony regarding the TACAN system did not prejudice petitioner because "[t]he testimony excluded would not have established any legitimate defense under the circumstances of the case at bar" (Pet. App. A15).

The court of appeals' conclusion is clearly correct. Count 1 charged the export of night vision goggles, items that fall within Category XII of the Munitions List. That category includes "night sighting and night viewing equip-

ment." See 22 C.F.R. 121.1, Category XII(a). Although subsection (c) of Category XII contains an exception for items in "normal commercial use," that subsection by its terms applies only to "[c]omponents, parts, accessories, attachments, and associated equipment specifically designed or modified for the articles in paragraphs (a) and (b)," which contain the items subject to licensing. Subsection (c) is not a free-standing category that provides an exception for any item found in subsections (a) or (b) that happens to be in normal commercial use.

Similarly, Counts 2 and 4 charged the export of items that fell into Category XI of the Munitions List, which governs the export of "electronic equipment * * * for military application" (see Pet. App. A13 n.15). Thus, because as a matter of law the expert testimony that petitioner sought to elicit was incorrect, the district court properly excluded it.

CONCLUSION

With respect to the question presented concerning the search of petitioners' trash, the petition for a writ of certiorari should be held pending the resolution of *California* v. *Greenwood, supra*. In all other respects the petition should be denied.

Respectfully submitted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 87-1156

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
Respondent,

vs.

WERNER ERNST GREGG and ROSWITHA L. GREGG,
Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

STATEMENT

The Petitioners incorporate by reference the statement of the case and the statement of jurisdiction that are present in the original Petition.[1] The purpose of this Reply Brief is to address certain matters that were raised in the Government's Response thought to be inaccurate.

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1. Vol. ..... means trial transcript reference; M.S. Vol. ..... means Motion to Suppress transcript reference; M.S.E. means Motion to Suppress Exhibit; These references are part of record in the Eighth Circuit Court of Appeals; GB means Government's Brief in Opposition to Petition for Certiorari; Pet. at ..... means Joint Petition for Writ of Certiorari; Pet. App. ..... means Appendix to Joint Petition.

ARGUMENT

I.

The Petition Before the Court Should Not Be Held in Abeyance Pending the Decision of the California v. Greenwood Case.

The government suggests (GB at 7) that the validity of the searches of Petitioners' trash at the residence and place of business should be held pending the outcome of the case of *California v. Greenwood*, No. 86-684 (argued January 11, 1988) that is now pending before this honorable court. Petitioner Werner Gregg is presently incarcerated in the Medical Center for Federal Prisoners in Springfield, Missouri.[2] Petitioner respectfully states that should this Petition for Writ of Certiorari be granted, Petitioner in all likelihood will apply for bail from this honorable court. Further, since the Petitioner is now serving his period of confinement, justice requires that this matter be resolved as soon as possible. Thus, under these circumstances, it would be unfair to delay action on this Petition for Writ of Certiorari.

II.

The Seizure of the Telex Communications in This Cause As Well As the Execution of the Search Warrants Did Not Conform With the Particularity Requirements of the Fourth Amendment.

The United States in its Brief raises a number of reasons as to why the Application for Writ of Certiorari

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2. During the pendency of Petitioner Werner Gregg's appeal before the United States Court of Appeals for the Eighth Circuit, Werner Gregg was indicted on new charges related in part to the exportation of the laser navigational system. As a result of those new charges, Mr. Gregg's bond was revoked and the Eighth Circuit chose not to reinstate that bond. However, since that time, Mr. Gregg has been tried and acquitted on all those charges.

by Petitioners should not be granted. The government argues that Petitioners have abandoned their claim that Title III was applicable to the telex interception that occurred in 1984. (GB at 7). The government further claims that it is Petitioners' contention that the magistrate issuing the warrant was required to follow the statutory safeguards embodied in Title III. The government has in part misstated Petitioners' point while choosing to seek form over substance. Petitioners have always maintained the telex interceptions must comply with the particularity requirements of the Fourth Amendment. This is aptly stated in *Osborn v. United States*, 385 U.S. 323 (1966); *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967). The government argues that the interception of the telexes in this case does not conflict with this Court's decisions in *Osborn v. United States*, *Berger v. New York*, and *Katz v. United States*. And yet, in each of those decisions some constraints were placed on how to obtain authorized interceptions of electronic communications. Regardless of whether Title III strictly applies to the telex interceptions at issue, some restraints in order to minimize the seizure should be required as suggested in *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985); *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986), *cert. denied*, No. 85-2108 (Oct. 6, 1986) and *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987).[3] The issue is a Fourth Amendment particularity issue rather than a strict interpretation of the applicability of Title III to telexes at the time

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3. The record is absolutely undisputed that there was no minimization of the telex interception. (Pet. at p. 5 especially Note 4; M.S. Vol. II at 371, 372). Also, the recent amendment of 18 U.S.C. Section 2510(4) now reads "aural or other" acquisition, Electronic Communications Privacy Act of 1986, see *Congressional Record*, Vol. 123, No. 134-Part II, Oct. 2, 1986, H8977.

of the interception. It is respectfully suggested that the same concerns regarding particularity and minimization addressed by the court in *Berger v. New York* apply in the instant cause. As indicated, the Second, Fifth and Seventh Circuits have addressed the issue of what particularity requirements of the Fourth Amendment should apply to other forms of electronic surveillance. In those cases in particular, television surveillance was involved. *Torres* held that Title III did not apply to other forms of electronic surveillance at that time. However, *Torres* and its progeny suggest that the safeguards of Title III should be used as a guidepost or an indicia of minimum standards in evaluating the Fourth Amendment particularity requirements in the context of electronic surveillance not covered by the wire tap statute. This is stated best in *Biasucci*:

> We likewise believe that these standards, borrowed from Title III, together with the more general constitutional requirements, form a sufficient outline of the showing the government must make before a warrant should issue authorizing video surveillance. Application for video surveillance should not be strictly judged by all of the other procedures and requisites of Title III, however, like the Seventh Circuit, we borrow the statutory standards quoted above as a measure of the government's constitutional obligation.

Biasucci at 510.

The government's theory is that the telex interceptions are much less intrusive than the television surveillance described in *Torres*, *Biasucci* and *Cueva-Sanchez*. (GB at 9). The telex interceptions were certainly as intrusive as the video surveillance in *Torres*. In *Torres*,

the government sought video surveillance of safehouses used by Puerto Rican terrorists. It was thought that those safehouses would be used only for the criminal conduct of making and constructing bombs. It was further felt that the terrorists themselves, fearing aural interception, would often plot in the safehouses without speaking audibly. Thus, the surveillance in *Torres* involved non-oral activities of the terrorist group, and only when individuals were present at the safehouses. By contrast, in this case well over half of the seized telexes involved legitimate conduct, but every telex was seized. (M.S. Vol. IV, pp. 625-654).

Further, some of the seized telexes contained references to non-business or personal communication.[4] The overseizure of telexes in this cause and the lack of minimization was described by the district court as "defendant's most cogent argument regarding particularity". (Pet. App. A35). The government also seems to labor under the impression that minimization was technologically impossible. (GB at 8). The only evidence on this issue at the Motion to Suppress was from two experts called by the Petitioners. Both individuals testified that such minimization was easily within the constraints of the technology at the time. (M.S. Vol. II, pp. 373-374; M.S. Vol. III at 467 and 468).

The government also questions Petitioners' contention that the telex interception orders as well as the description of the search warrants utilized to search the

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4. As cited both in Petitioner's Joint Petition and in the transcript of the Motion to Suppress, Volume IV, pp. 625-654, Petitioner in this cause had a lawyer, Kenneth Doyle, trained in customs law, review the telex in this cause. His review indicated that there were 3,459 telex communications seizures and he only found 1,236 which involved companies or products involving illegalities named in the affidavits that allowed the interception itself.

residence and business of Petitioners were overbroad and allowed a general search contrary to the precedents of this court and the various courts of appeals. (See GB at 10).

To evaluate this point, one must be aware of the actual scope of the seizures in this case. There were 3,459 telex interceptions alone. The seized documents filled close to 100 boxes and certainly numbered well into six figures. The agents themselves indicated the document seizure was done with the agents' "painting a broad brush". (M.S. Vol. III at 416). They admitted seizing virtually all of the business records. (M.S. Vol. III at 459, 505). In fact, the agents assumed all of the business records were subject to seizure. (M.S. Vol. III at 448). The seizure was so massive that nine months later the customs agents were still sorting through the documents to determine what was relevant. (M.S. Vol. III at 459). Clearly the subjects of overseizure, lack of minimization, and lack of particularity were the major emphasis of the Eighth Circuit briefs, the oral argument, and the Motion for Rehearing. Yet, the Court of Appeals failed to even address these issues.

The government cites two cases which stand for the proposition that a warrant may describe a broad category of documents, when a more precise description of items to be seized is not possible. See, *Williams v. Kunze*, 806 F.2d 594, 598 (5th Cir. 1986); *United States v. Gomez-Soto*, 723 F.2d 649, 654 (9th Cir.), *cert. denied*, 466 U.S. 977 (1984). (See also, GB at 10). These cases are distinguishable from the matters that are before this court. In *Gomez-Soto*, the evidence indicated that virtually all of the defendant's business was related to the sale of narcotics. Here the record shows that Petitioners were involved in substantial legitimate transactions. Further,

one portion of the description in the warrant in *Gomez-Soto* was found to be invalid. That provision called for the seizure of evidence demonstrating failure to file currency transaction reports. Such a description is very close to the kind of description that arose in regards to the search warrants in this cause. In *Gomez-Soto* officers were exercising their discretion to determine what documents demonstrated failure to file currency transaction reports. In this case, the search warrant description allowed the seizing officers to use their discretion in determining what items should be seized.[5] In *Williams v. Kunze*, the search warrant was limited to what was described by the Fifth Circuit as "to seven specifically described categories of documents" and again does not appear to have relied on generic references to broad federal statutes.

The government in its own brief, inadvertently demonstrates Petitioners' point very aptly. On p. 10 of that brief it is stated as follows:

> Contrary to Petitioners' assertion, the warrant did not allow the seizure of 'all business documents of Gregg International. Rather the warrant was limited to documents that consist of sales, invoices, shipping papers, purchase order, correspondence, payment records, and telex relating to the purchases, sale, storage, transportation, financing of merchandise exported or to be exported from the United States' in violation of several export administration regulations, federal statutes and executive order.

(See generally, GB at 10; Pet. App. 40 Note 8).

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5. The warrants in this cause referenced only broad criminal statutes touching upon complex doctrines of export law. (Pet. at 5, 6).

However, the testimony was that with such description the government did in fact seize virtually all of the business documents of Gregg International. (M.S. Vol. III at 448; M.S. Vol. IV at 505; M.S. Vol. III at 416). This poignantly demonstrates Petitioners' point. The overlybroad description caused a general seizure of all the records. The seizure included random confiscation of such items as laundry lists, Kansas City Chiefs football tickets, blank checks, personal diaries as well as every piece of paper imaginable. (M.S. Vol. III at 431-444). See, *Voss v. Bergsgaard*, 774 F.2d 402, 405 (10th Cir. 1985).

III.

The Writ Should Be Granted Because the Failure of the District Court to Allow the Admission of the Expert Testimony and the Accompanying Regulations Denied Petitioner His Rights of Compulsory Process As Guaranteed to Him Through the Sixth Amendment and Due Process of Law As Guaranteed to Him Through the Fifth Amendment.

At the trial of this cause, Petitioner Werner Gregg unsuccessfully attempted to introduce into evidence various export regulations. Petitioner's legal arguments for the admission of that evidence are contained in pp. 22-24 of the original Petition in this cause and the same does not need to be restated.

However, the Petitioner desires to rebut certain factual points. (GB at 13). The exportation of avionic equipment generally requires the use of export licenses issued either by the Department of Commerce or the Department of State. The Petitioner Werner Ernst Gregg possessed over 40 such licenses. There is a well estab-

lished concept in the area of export administration called the "dual use exception".[6] Generally, if a commodity has both a commercial and military use, then, the Department of Commerce is responsible for the export licensing.

Petitioner at trial attempted to show that the regulations involving the licensing of the questioned exported items were subject to various interpretations and that he did not specifically intend to violate the export laws. Admittedly, there was substantial evidence that Werner Ernst Gregg possessed a variety of export licenses. However, the relevant question was whether he knowingly and willfully used the inappropriate license.[7]

CONCLUSION

For the reasons stated herein as well as those addressed in the original Joint Petition for the court, the Petitioners' Application for Writ of Certiorari should be GRANTED.[8]

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6. A closely related concept is the normal commercial use exception. Both the "dual use" and "normal commercial use" doctrines were briefed and argued in the Eighth Circuit. (See Joint Addendum filed by Petitioners).

7. The government was allowed to offer opinion evidence or to the licensing requirements of the various charged items. However, the Petitioner was denied this same right. As stated in the Joint Petition the exclusion of this evidence and the Eighth Circuit's rationale for the same offended constitutional doctrines of compulsory process and confrontation of evidence against the Petitioner as guaranteed by the Sixth Amendment; his Fifth Amendment right to remain silent; and the improper shifting the burden of proof as protected by the doctrine of due process of law. (See generally, Pet. 24).

8. There are certain factual inaccuracies in the government's response that Petitioners specifically ask be rebutted. The government argues that Werner Ernst Gregg was convicted of attempting to export a laser inertial navigational system without a Commerce Department license. (GB at 2). At the time of the seizure of that item, Werner Gregg did possess a GTE license issued by the Department of Commerce. (M.S.E. at 107-

(Continued on following page)

Respectfully submitted,

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Footnote continued—

109). Petitioner Werner Gregg has always indicated that he intended to use the GTE license in exporting that piece of equipment. (Vol. V, at 83-85). Further the government argues Werner Gregg did not dispute that he had exported or attempted to export the items that were charged. (GB at 5). Two counts of the indictment involved the exportation of Litton night vision goggles and a TOW missile system. Although Werner Gregg did not testify in this trial, he has always indicated that the exportation of those two items was accomplished by an employee of his, George Byram. (Vol. III, pp. 37, 189-191). The remaining counts did involve Petitioner's defense that he did not have any specific intent.